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No. (1) 07-783

In The

Supreme Court of the United States

NOVATO UNIFIED SCHOOL DISTRICT,
DR. JOHN BERNARD and LISA SCHWARTZ,

Petitioners,

v.

ANDREW D. SMITH, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether California Education Code § 48907 is constitutionally infirm *as written* because it fails to adequately define "substantial disruption of the operation of the school"?

2. Whether California Court of Appeal's attempt to define the limits of the School District's authority under § 48907 makes the statute unconstitutional *as applied* by inhibiting the District's ability to balance the constitutionally-protected rights of *all* students by allowing freedom of expression to an individual student while, at the same time, avoiding a disruption of school activities for the rest of the student body?

PARTIES

Petitioner Novato Unified School District is a public education provider duly-organized under the laws of the State of California. The District is comprised of eight (8) elementary, three (3) middle, two (2) high schools, and three (3) alternative programs – all located in the City of Novato, Marin County, California.

Dr. John Bernard is an employee of Novato Unified School District. Dr. Bernard, who is District Superintendent, was sued individually in the underlying action.

Lisa Schwartz is an employee of Novato Unified School District. Ms. Schwartz, the Principal of Novato High School, was sued individually in the underlying action.

At all times relevant, Respondent Andrew D. Smith, an individual, was a minor represented by his father Dale R. Smith, also an individual.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
FACTUAL STATEMENT	4
PROCEDURAL HISTORY	5
REASONS FOR GRANTING THE WRIT	7
I. CALIFORNIA EDUCATION CODE § 48907 *AS WRITTEN* IS CONSTITUTIONALLY INFIRM BECAUSE IT FAILS TO ADEQUATELY DEFINE "SUBSTANTIAL DISRUPTION OF THE OPERATION OF THE SCHOOL."	7
II. CALIFORNIA EDUCATION CODE § 48907 *AS APPLIED* VIOLATES THE PROPERTY RIGHTS OF CALIFORNIA SCHOOL CHILDREN IN A PUBLIC EDUCATION BY PRECLUDING SCHOOL ADMINISTRATORS THE FLEXIBILITY NEEDED TO PREVENT THE DISRUPTION OF SCHOOL ACTIVITIES	10
A. As a Group, California School Children Have a Property Interest in Receiving a Public Education Which Is Guaranteed by the Fourteenth Amendment Against Disruption as the Result of State Action	11

TABLE OF CONTENTS – Continued

Page

B. The Right of Individual Students to Exercise Their First Amendment Freedoms at School Are Limited by (Among Other Things) the Property Interests of Their Fellow Students 12

C. School Officials Are Charged With the Delicate Task of Balancing and Protecting *Both* the Expressive Rights of Individual Students *and* the Property Interests of the Pupils Who Want To Learn 13

D. By Interpreting § 48907 To Extend "Broader" Rights of Expression to Individual Students Than Permitted Under the First Amendment, the California Court of Appeal's Decision Inhibits the Ability of School Administrators to Protect the Property Interests of California Public School Students..... 16

E. As a Matter of Sound Public Policy, Courts Have Traditionally Deferred to School Officials on Matters Involving the Daily Operation of Our Public School Systems 20

CONCLUSION 22

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the California Court of Appeal, First Appellate District, Division Five (Filed May 21, 2007)..... App. 1

Modification Order of the California Court of Appeal, First Appellate District, Division Five (Filed June 20, 2007)..... App. 55

Statement of Decision of the Superior Court of California For the County of Marin (Filed August 26, 2005)..... App. 56

Order of the California Court of Appeal, First Appellate District, Division Five Denying Rehearing Petitions (Filed June 20, 2007)... App. 80

Order of the Supreme Court of California Denying Petition For Review (Filed September 12, 2007) ..... App. 81

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 13, 14, 15, 16, 20

Board of Education v. Pico, 457 U.S. 853 (1982) 21

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Davis v. Monroe County Bd. of Education, 526 U.S. 629 (1999) 21

Epperson v. Arkansas, 393 U.S. 97 (1968) 21

Goss v. Lopez, 419 U.S. 565 (1975) 3, 11, 12

Grayned v. City of Rockford, 408 U.S. 104 (1972) 9, 12, 13

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 11, 19

Ingraham v. Wright, 430 U.S. 651 (1977) 12

New Jersey v. T.L.O., 469 U.S. 325 (1985) 16

Parents Involved in Community Schools v. Seattle School Dist. No. 1, ___ U.S. ___ [127 S.Ct. 2738] (2007) 21

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) 1

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) ..... *passim*

Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005) 12

TABLE OF AUTHORITIES – Continued

Page

FEDERAL CASES

Bennett v. Hendrix, 423 F.3d 1247 (11th Cir. 2005) 9

Blackwell v. Issaquena County Bd. of Ed., 363 F.2d 749 (5th Cir. 1966) 11, 12, 13, 17

Bystrom By and Through Bystrom v. Fridley High School, Independent School Dist. No. 14, 822 F.2d 747 (8th Cir. 1987) 13, 18

Collinson v. Gott, 895 F.2d 994 (4th Cir. 1990) 9

Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) 8

McConnell v. Federal Election Commission, 251 F.Supp.2d 176 (D.D.C. 2003) 3

Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975) 7, 8, 9

Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) 14

West v. Derby Unified School District No. 260, 206 F.3d 1358 (10th Cir. 2000) 16, 17

STATE CASES

Lopez v. Tulare Joint Union High School Dist., 34 Cal.App.4th 1302 (1995) 2

FEDERAL STATUTES

28 U.S.C. § 1257 ..... 1, 2

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

California Education Code § 48907 ..... *passim*

OTHER AUTHORITIES

L. Tribe, *American Constitutional Law*, § 12-1 (2d ed. 1988) 3

Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal and California Constitutions, 20 Loyola L.A.L.Rev. 1055 (1987) 2

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Five is reported at 150 Cal.App.4th 1439 [59 Cal.Rptr.3d 508]. The California Supreme Court's order denying review is unreported, No. S154067.

JURISDICTION

The California Court of Appeal's decision in this case was issued on May 21, 2007. The decision was modified on June 20, 2007. The California Supreme Court denied review of the case on September 12, 2007.

"Final judgments rendered by a state's highest court are reviewable by writ of certiorari . . . where the constitutionality of a state law is at issue." 28 U.S.C. § 1257.

Where (as here) the state appellate court's judgment itself unexpectedly deprives a party of a federal constitutional right, the constitutional question involved may be raised for the first time in a petition for writ of certiorari. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455 (1924). "[T]he question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow." *Ibid.*

The state court's decision reversed a judgment in favor of Petitioners and remanded the matter for

further proceedings. As such, the state court's judgment is considered "final" for purposes of certiorari review under 28 U.S.C. § 1257. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-483 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California's Education Code § 48907 protects "the right [of students in public schools] to exercise freedom of speech and of the press" except where the exercise of those rights "so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school." (Text of statute is set out at App. 12)

According to the legislative history of § 48907, the statute was "intended as a codification of students' constitutional rights." Note, *Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal and California Constitutions* 20 Loyola L.A.L.Rev. 1055, 1098, fn. 213 (1987). As such, § 48907 "constitutes a statutory embodiment of *Tinker* [*v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)] and related First

Amendment cases. . . ." *Lopez v. Tulare Joint Union High School Dist.*, 34 Cal.App.4th 1302, 1318 (1995).[1]

While the right to public education is not expressly enumerated in the Constitution, this Court has found that every student has a property interest in receiving a public education when a state (in this case, California) establishes and maintains a public school system. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975). A student's interest in his/her public education is therefore guaranteed against the actions of the State by the Fourteenth Amendment. *Ibid.* Since "education is perhaps the most important function of state and local governments," the "authority possessed by the State to prescribe and enforce standards of conduct in its schools . . . must be exercised so as to constitutionally safeguard the students' legitimate entitlement to a public education as a property interest" from even *de minimis* interruptions. *Id.* at 574, 576.

Section 48907 must be interpreted to strike the delicate balance between the First Amendment rights of individual students and the property rights of their classmates in receiving a public education. Consistent

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[1] See L. Tribe, *American Constitutional Law*, § 12-1, at p.785, fn. 2 (2d ed. 1988); *McConnell v. Federal Election Commission*, 251 F.Supp.2d 176, 234, n. 62 (D.D.C. 2003) [The term "freedom of speech" has consistently been employed by commentators, courts and legislators, alike, as "shorthand" for the freedoms secured from government interference by the First Amendment].

with this Court's previous decisions, the California State Legislature can, and should, recognize an individual student's constitutionally-protected freedom of expression. However, under the Fourteenth Amendment, the Legislature's enactment must be interpreted so as to protect the property interests of other students to a safe, productive and positive school environment.

FACTUAL STATEMENT

During the 2001-2002 school year, Andrew Smith, a senior at Novato High School, enrolled in a journalism class. As part of the class, the students published a newspaper called *The Buzz*. Smith wrote an opinion editorial for *The Buzz* entitled "Immigration." Smith's editorial contained many statements which Smith intentionally worded so as to be offensive to the Hispanic community. The publication of the article caused an immediate reaction among both students and parents – including the disruption of classes and violence between students.

To avoid any further disruption of school operations, District officials (among other things) sent a letter to parents of all students, stating: "Yesterday the November issue of our school's student newspaper . . . included an opinion article representing the beliefs of one student that negatively presented immigrants in general and Hispanics in particular. We are writing to express our deepest regrets for the

hurt and anger this article has generated for both students and their parents. [¶] This article should not have been printed in our student newspaper, as it violates our District's Board Policy regarding student publications. . . ."

In the letter, the District did the best it could to prevent embarrassment to Smith. School officials avoided referring to either Smith or the article by name, and carefully worded the letter as an apology for *its* actions – not for Smith's opinions.

PROCEDURAL HISTORY

Andrew Smith, through his father, Dale Smith, sued the Novato School District and the individual Petitioners for violation of his First Amendment rights, as guaranteed by the Fourteenth Amendment and California Education Code § 48907. The trial court, applying federal constitutional standards, held "Immigration" ***is not*** constitutionally-protected speech under § 48907, because it contained "insulting, derogatory and disrespectful speech directed at various ethnic groups" which caused an immediate disruption of classes and increase in violence between students. The trial court also concluded the school administrators who had been named by Smith as individual defendants were entitled to governmental immunity.

In a published decision, the Court of Appeal *reversed* the judgment of the trial court, finding

"Immigration" ***is*** constitutionally-protected speech. In its decision, the Court of Appeal concluded "the District's response to 'Immigration' infringed on Smith's right to exercise freedom of speech and violated section 48907" because it had the potential of "chilling any further dissemination of the protected message in 'Immigration.'" (App. 34, 40)

The Court of Appeal also disagreed with the trial court's conclusion regarding immunity for the School's principal and District superintendent in charge. (App. 43) According to the appellate court, their conduct "was not the sensitive 'quasi-legislative policy-making'" protected by governmental immunity. (App. 46)

The District sought a rehearing before the California Court of Appeal arguing (among other things) that § 48907 was constitutionally infirm. In response, the California Court of Appeal modified its opinion in a manner unrelated to the constitutional issues involved and then denied the District's Petition for Rehearing. (App. 55, 80)

The District then petitioned the California Supreme Court for review based (among other things) on the unconstitutionality of § 48907. The California Supreme Court denied review of the case on September 12, 2007. (App. 81)

REASONS FOR GRANTING THE WRIT

I. CALIFORNIA EDUCATION CODE § 48907 *AS WRITTEN* IS CONSTITUTIONALLY INFIRM BECAUSE IT FAILS TO ADEQUATELY DEFINE "SUBSTANTIAL DISRUPTION OF THE OPERATION OF THE SCHOOL."

As noted above, California Education Code § 48907 protects "the right [of students in public schools] to exercise freedom of speech and of the press" . . . except where the exercise of those rights "so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or **the substantial disruption of the orderly operation of the school.**" (App. 12-13)

In *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975), the Fourth Circuit was asked to review a regulation which employed language much like that used in § 48907:

> Literature may be distributed and posted by the student of the subject school in designated areas on school property as long as it is not obscene or libelous (as defined below) and as long as the distribution of said literature does not reasonably lead the principal to forecast **substantial disruption of or material interference with school activities**.

The *Nitzberg* Court found: "A crucial flaw exists in this directive since it gives no guidance whatsoever

as to what amounts to a 'substantial disruption of or material interference with' school activities; and, equally fatal, it fails to detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption." *Id.* at 383. The Court declared the regulations "void for vagueness and overbreadth." *Id.*

In this case, school administrators at Novato High School were asked, in the face of increasing violence and disruption of school activities, to quickly determine whether Smith's right to exercise his First Amendment freedoms of speech and of the press had so incited students "as to create a . . . *substantial disruption* of the orderly operation of the school." They were forced to do so, under penalty of personal liability, without any guidance from the Legislature, or objective definition of "substantial disruption" in the § 48907.

As noted by the Seventh Circuit in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), "Many aspects of the law with respect to students' speech . . . are difficult to understand and apply." *Id.* at 739. The Court of Appeals stated the obvious: Public officials should not be forced to "predict, at their financial peril, how constitutional uncertainties will be resolved." *Id.*

The California Court of Appeal's opinion in this case imposes just such an impossible burden on public school officials in California. Section 48907, like the regulations in *Nitzberg*, fails to detail the criteria by which a school administrator might reasonably predict

the occurrence of a "substantial disruption of or material interference with' school activities." *Id.* at 383.

As noted by this Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-109 [footnotes omitted].

This is especially true, where (as here) "a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms. . . .'" *Id.* at 109. The statute must "provide[ ] notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights." *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005); see also *Collinson v. Gott*, 895 F.2d 994, 1001 (4th Cir. 1990). If it does not provide sufficient guidance to be properly enforced, the statute is "void for vagueness and overbreadth." *Nitzberg v. Parks*, *supra*, 525 F.2d at 383.

II. CALIFORNIA EDUCATION CODE § 48907 *AS APPLIED* VIOLATES THE PROPERTY RIGHTS OF CALIFORNIA SCHOOL CHILDREN IN A PUBLIC EDUCATION BY PRECLUDING SCHOOL ADMINISTRATORS THE FLEXIBILITY NEEDED TO PREVENT THE DISRUPTION OF SCHOOL ACTIVITIES.

The effect of § 48907's constitutional infirmity is illustrated by the California Court of Appeal's attempt to apply the statute to the circumstances of this case:

> The statutory language of section 48907 critical to our review [is as] follows: "Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or **the substantial disruption of the orderly operation of the school.**" . . . .
>
> . . . . We conclude that the plain language of section 48907 mandates that a school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption. **Schools may *only* prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance.** (App. 24)

In so ruling, the California court recognized that its interpretation of "section 48907 provides **broader** protection for student speech in California public school newspapers" than this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (*Kuhlmeier*). (App. 15; emphasis added) The court added, "as a matter of California statutory law, '[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is **not available to *this* state's educators**.'" (App. 15; emphasis added)

California has clearly gone "off the reservation." Under the State appellate court's interpretation of § 48907 (in which the California Supreme Court has acquiesced), the statute is unconstitutional *as applied*.

A. As a Group, California School Children Have a Property Interest in Receiving a Public Education Which Is Guaranteed by the Fourteenth Amendment Against Disruption as the Result of State Action.

"The proper operation of public school systems is one of the highest and most fundamental responsibilities of the state." *Blackwell v. Issaquena County Bd. of Ed.*, 363 F.2d 749, 754 (5th Cir. 1966). As noted above, this Court has found that a student has a property interest in receiving a public education when a state (in this case, California) establishes and maintains a public school system. See *Goss v. Lopez*,

supra, 419 U.S. at 574; *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 789, 791, n. 20 (2005); *Ingraham v. Wright*, 430 U.S. 651, 674, n. 43 (1977). That interest is protected against the actions of the State by the Fourteenth Amendment. *Goss v. Lopez*, *supra*, 419 U.S. at 574.

B. The Right of Individual Students to Exercise Their First Amendment Freedoms at School Are Limited by (Among Other Things) the Property Interests of Their Fellow Students.

This Court has made it clear students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). However, "[i]t is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 522 (1969) [Black, J., dissenting]; *Blackwell v. Issaquena County Bd. of Ed.*, *supra*, 363 F.2d at 753-754 ["The constitutional guarantee of freedom of speech 'does not confer an absolute right to speak' . . . "].

Nowhere is it suggested that students, teachers, or anyone else have an absolute constitutional right to use a school campus for their unlimited expressive purposes. *Grayned v. City of Rockford*, 408 U.S. 104, 118-119 (1972). Expressive activity may be restricted

if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 119.

The constitutional freedoms of speech and press do not "compel[ ] the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Tinker v. Des Moines Independent Community School Dist., supra*, 393 U.S. at 526 [Black, J., dissenting]; *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986).

C. School Officials Are Charged With the Delicate Task of Balancing and Protecting *Both* the Expressive Rights of Individual Students *and* the Property Interests of the Pupils Who Want To Learn.

As noted above, it falls upon school administrators to balance the expressive rights of individual students and the property rights of the pupils who want to learn. See *Bystrom By and Through Bystrom v. Fridley High School, Independent School Dist. No. 14*, 822 F.2d 747, 750-751 (8th Cir. 1987). School authorities have a duty to protect the substantial interest of students in the orderly conduct of the school. *Blackwell v. Issaquena County Bd. of Ed., supra*, 363 F.2d at 754.

To accomplish this task, school officials may ban speech creating a "hostile environment" if it "intrudes upon . . . the rights of other students." *Tinker v. Des*

Moines Independent Community School Dist., supra, 393 U.S. at 504. A school need not tolerate student speech that is inconsistent with its "basic educational mission" – even though the government could not censor similar speech outside the school. *Bethel School District No. 403 v. Fraser, supra*, 478 U.S. at 685.

> It is generally held that the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations "reasonably designed to adjust these rights to the needs of the school environment" .... Specifically, school authorities may appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "'reasonably' forecast substantial disruption of or material interference with school activities" on account of the distribution of such printed material. *Quarterman v. Byrd,* 453 F.2d 54, 57-58 (4th Cir. 1971).

As Justice Black suggested in his dissent in *Tinker*, those pupils who want to learn are not required to subordinate their interests to "the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Tinker v. Des Moines Independent Community School Dist., supra*, 393 U.S. at 525 [Black, J., dissenting].

> [P]ublic school students [are not] sent to the schools at public expense to broadcast political or any other views to educate and inform

> the public. The original idea of schools . . . was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. . . . [T]axpayers send children to school on the premise that at their age they need to learn, not teach. *Id.* at 522 [Black, J., dissenting].

This Court has indicated offensive language is one type of student speech that is *inconsistent* with our school system's "basic educational mission." As stated by this Court in *Bethel School District No. 403 v. Fraser*, *supra*, 478 U.S. 675, "It is a highly appropriate function of public school education to prohibit the use of . . . offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. . . .'" *Id.* at 683. School districts, as instruments of the state, "may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates . . . offensive speech and conduct. . . ." *Id.*

This approach to offensive speech is consistent with First Amendment principles. As noted by this Court in several of its opinions:

> [The place of offensive speech] in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy [in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)], when he said: "[S]uch utterances are no essential part of any exposition of ideas,

and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Bethel School District No. 403 v. Fraser*, *supra*, 478 U.S. at 685 [quoting from *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 746 (1978)].

D. By Interpreting § 48907 To Extend "Broader" Rights of Expression to Individual Students Than Permitted Under the First Amendment, the California Court of Appeal's Decision Inhibits the Ability of School Administrators to Protect the Property Interests of California Public School Students.

Statutes aimed at guaranteeing students' First Amendment rights must be "applied in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent Community School Dist.*, *supra*, 393 U.S. at 506; see also *New Jersey v. T.L.O.*, 469 U.S. 325, 341-343 (1985). They should be designed and interpreted "to give pupils who want to learn the opportunity to do so." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. at 525 [Black, J., dissenting].

In *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000), for example, a middle school student was suspended for drawing a Confederate flag in math class. The Tenth Circuit upheld the

suspension, finding that the school had demonstrated a concrete threat of substantial disruption. *Id.* at 1366. In particular, "[t]he District experienced a series of racial incidents [including "hostile confrontations" and at least one fight] in 1995, some of which were related to the Confederate flag." *Id.* The Court found the policies adopted by the District were "clearly something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* The policies were adopted to avoid the predictable "disruption and interfere with the rights of other students to be secure and let alone" which would arise from the student's conduct. *Id.*

Likewise, in *Blackwell v. Issaquena County Bd. of Ed.*, 363 F.2d 749 (5th Cir. 1966), the Court found: "The School authorities . . . had a legitimate and substantial interest in the orderly conduct of the school and a duty to protect such substantial interests in the school's operation." *Id.* at 754. The Court upheld the School Board's regulations limiting freedom of expression because "an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum" had been caused by the students' activities. *Id.*

> It is always within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine. This is not only proper in our opinion but is necessary. *Id.* at 753.

In this case, Smith admits he chose harsh, derogatory words and phrases that he knew would be offensive to the Hispanic community. The insulting words he selected were not necessary to the political points being made. According to Smith, he "hated" all illegal aliens because "some Mexicans" beat up his father. Smith hoped that his article would "piss-off" the Latino community. He said he got a "kick out of" watching the two sides "square off" in violent confrontations.

Smith's article had the desired affect. The day after its publication, two Hispanic students confronted Smith and threatened to "kick his ass." As many as one hundred students walked out of class and refused to return. The students who stayed in class spent most of the day talking about their feelings. Many were crying; racial tensions at the school ran high. Parents came to the high school demanding to speak with administrators; several community meetings were held to relieve the tension.

Given the disruption at the high school, the District's actions were not only appropriate, but necessary, to protect the students and restore a learning environment. See *Bystrom v. Fridley High School, Independent School Dist. No. 14*, *supra*, 822 F.2d at 750-751 [upholding District's actions "designed to assure that school hours and school property are devoted primarily to education as embodied in the district's prescribed curriculum"; or "preserve some trace of calm on school property"; or "promoting respect for authority and traditional values be they

social, moral, or political"]. Under the standards enunciated by this Court in the cases discussed above (primary among them the case of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)), the District balanced the competing interests in this case by allowing Smith to exercise his freedom of expression to the fullest extent possible, and then reacting to the resulting disruption in a manner carefully crafted to restore order without embarrassing or punishing Smith for his views.

However, the District's reaction – while more than adequate elsewhere in the nation – is not good enough for California. According to the California Court of Appeal, § 48907 provides *broader* protection for student speech in California public school newspapers than *Kuhlmeier*. (App. 15; emphasis added) In fact, as a matter of California statutory law, the protections enunciated in *Kuhlmeier* are "not available to *this* state's educators." (*Id.*; emphasis added)

Under the California appellate court's interpretation of § 48907, school administrators' right to restore order in California schools when disruption occurs is severely limited. In California, school officials now "may *only* prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance." (App. 24; emphasis added)

By interpreting § 48907 to extend "broader" rights of expression to individual students than permitted under the First Amendment, the California Court of Appeal's decision inhibits the ability of school administrators to protect the property interests of other California public school students. As interpreted and applied by the California court in this case, § 48907 therefore violates the Fourteenth Amendment. The limitations placed on school administrators by the California court's decision in this case upsets the delicate balance fashioned by this Court in *Tinker* and its progeny.[2]

E. As a Matter of Sound Public Policy, Courts Have Traditionally Deferred to School Officials on Matters Involving the Daily Operation of Our Public School Systems.

The Court has "repeatedly emphasized the need for affirming the comprehensive authority of . . . school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines School Dist.*, *supra*, 393 U.S. at 507; *Bethel School District No. 403 v. Fraser*, *supra*, 478 U.S. at 683 [the determination of what manner of speech in school is inappropriate

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[2] The Court of Appeal's decision in this case has been published in the official reporting system of the State, and therefore has become an established precedent for the California courts.

properly rests with the school board]; *Davis v. Monroe County Bd. of Education*, 526 U.S. 629, 646 (1999); *Board of Education v. Pico*, 457 U.S. 853, 864 (1982). This policy insures that school officials are free to react to "a wide range of unanticipated conduct disruptive of the educational process." *Id.* at 686.

Furthermore, since "judges are [generally] not well suited to act as school administrators," it makes sense to defer to "a local school board's knowledge, expertise, and concerns in these particular matters." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, ___ U.S. ___ [127 S.Ct. 2738, 2826] (2007) [Breyer, J., Dissenting, with whom Stevens, J., Souter, J., and Ginsburg, J., Joined]. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems. . . ." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The California court in this case failed to heed these words of caution. It has thrust the judiciary into a position of second-guessing the daily decisions of school officials. The ill-advised foray of the California court should be reviewed by this Court before the imbalance it has created becomes widespread.

CONCLUSION

The California Court of Appeal's decision upsets the balance between the freedoms of speech and press guaranteed to individual students by the First Amendment and the property interests guaranteed to their fellow students by the Fourteenth Amendment. It severely limits the ability of school administrators in California to restore order in California public schools when disruption occurs and imposes potentially devastating personal liability on school administrators for even the slightest "flaw" in their implementation of school policies.

Certiorari should be granted to regain the balance and stability essential to the educational process in California.

Respectfully submitted,

WALSH & ASSOCIATES, APC
DENNIS J. WALSH
STEPHAN BIRGEL

Court of Appeal, First District, Division 5, California.

Andrew D. SMITH et al., Plaintiffs and Appellants,
v.
NOVATO UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.

No. A112083.

May 21, 2007.

Certified for Partial Publication.*

Marin County Superior Court, Hon. John A. Sutro, Jr.

Pacific Legal Foundation, Sharon L. Browne, Paul J. Beard II, Arthur B. Mark III, Damien M. Schiff and Scott A. Sommerdorf for Plaintiffs and Appellants.

Caldwell, Leslie, Newcombe & Pettit, Linda M. Burrow and Stephanie S. Christensen; ACLU Foundation of Southern California and the Student Press Law Center, Christine P. Sun and Peter Eliasberg as Amici Curiae on behalf of Plaintiffs and Appellants.

Law Offices of Dennis J. Walsh, Dennis J. Walsh and Stephan Birgel for Defendants and Respondents.

GEMELLO, J.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts V, VI, and VII.

The principal issue presented in this appeal is whether defendant Novato Unified School District (District) violated Education Code section 48907,[1] which guarantees student free speech rights in public high schools.

The trial court granted judgment for defendants, concluding that a student opinion editorial entitled "Immigration," was not protected speech under section 48907 because it constituted "fighting words," and that there was no infringement of the student's free speech rights because the opinion editorial was published.

We reverse, holding that "Immigration" was not speech likely to incite disruption within the meaning of section 48907 and that the District infringed plaintiff's rights by stating that the publication of "Immigration" violated the District speech policies. In the unpublished part of the decision we conclude that the District did not infringe plaintiff's rights vis-à-vis his opinion editorial "Reverse Racism," the individual defendants are not immune from liability, the District speech policies are consistent with section 48907, and the District Mission Statement is a general declaration of philosophical goals rather than an enforceable speech regulation.[2]

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[1] All further statutory references are to the Education Code unless otherwise indicated.

[2] In a separate decision in appeal number A111219, we reverse the award of costs in favor of the District.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Andrew D. Smith (Smith) was enrolled at Novato High School, a public school in defendant District from 1998 to 2002. Plaintiff Dale R. Smith, Andrew's father, is a taxpayer in the City of Novato and resides within the District's boundaries.

During the 2001-2002 school year, Smith was a senior at Novato High School, enrolled in a journalism class taught by Jennifer Leib. As part of the class, the students published a newspaper called *The Buzz*. The class elected Smith "Opinions Editor" for the first issue of *The Buzz*. Smith wrote an opinion editorial on illegal immigration entitled "Immigration." It included the following statements, which were the focus of the District and the trial court:

- "I'll even bet that if I took a stroll through the Canal district in San Rafael that I would find a lot of people that would answer a question of mine with 'que?', meaning that they don't speak English and don't know what the heck I'm talking about."

- "Seems to me that the only reason why they can't speak English is because they are illegal."

- "40% of all immigrants in America live in California . . . because Mexico is right across the border, comprende?"

- "[I]f they can't legally work, they have to make money illegal way [sic]. This might include drug dealing, robbery, or even welfare.

Others prefer to work with manual labor while being paid under the table tax free."

- "If a person looks suspicious then just stop them and ask a few questions, and if they answer 'que?', detain them and see if they are legal."

- "Others seem to think that there should be a huge wall along the Mexican/U.S. border."

- "Criminals usually flee here in order to escape their punishment."

Before publication, defendant Lisa Schwartz, acting principal of Novato High School (Principal), reviewed *The Buzz* for spelling and grammar, and for violations of the District's speech policies, Board Policy 5145.2 and Administrative Regulation 5145.2. In relevant part, Board Policy 5145.2 prohibits "any expression or materials . . . that create a clear and present danger that students will be incited to commit unlawful acts on school premises, to violate school rules, or to substantially disrupt the orderly operation of the school (EC 48907)."

"Immigration" was published in *The Buzz* and distributed at the high school during the morning of November 13, 2001. The Principal did not receive any complaints about the opinion editorial that day. However, the next day the Principal was approached by four or five Latino parents, who were upset and wanted to talk to her about "Immigration." The Principal met with the parents for about an hour. Two

vice-principals and a counselor then told her that some students were upset by the opinion editorial and were "out of class." When the school counselor opined that the students needed to talk about their feelings, the Principal decided to meet with all of the students who had left class. The parents on campus also joined the assembly.

Before the meeting, the Principal called defendant John Bernard, the District Superintendent (Superintendent), to tell him what was happening on campus. Without reading "Immigration," the Superintendent immediately instructed her to retract any remaining copies of *The Buzz*. The Principal directed the journalism teacher to collect the remaining copies of the newspaper.[3]

The Principal then met with the parents and students. Counselors brought in large sheets of paper so students could express their thoughts in writing. Students expressed their anger over the content of "Immigration." Some students were crying. The Principal apologized to the students and parents for "misinterpretation and misapplication of" board policy in the publication of "Immigration."[4] She

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[3] The trial court found that there were no undistributed copies of the newspaper to be collected. Plaintiffs do not challenge that factual finding on appeal.

[4] The Principal also testified that she stated that "the reason that the article was published was because the student had a right to free speech, in my judgment, at that time. . . ." It appears that the Principal was referring to her pre-publication

(Continued on following page)

warned that the school was not going to tolerate any violence or threats of violence against the author. The Superintendent and eight to ten teachers joined the meeting. At its highpoint during the lunch hour, about 100 to 150 students were in the lecture hall.

That same day the Principal and Superintendent prepared a letter to parents to be sent home with all students. The letter stated: "Yesterday the November issue of our school's student newspaper, *The NHS Buzz,* was distributed. This issue included an opinion article representing the beliefs of one student that negatively presented immigrants in general and Hispanics in particular. We are writing to express our deepest regrets for the hurt and anger this article has generated for both students and their parents. [¶] This article should not have been printed in our student newspaper, as it violates our District's Board Policy regarding student publications, which states, in part, 'Students' rights of expression shall be limited only as allowed by law in order to maintain an orderly school environment and to protect the rights, health, and safety of all members of the school community.' [¶] In addition, our district has a Human Relations and Respect Mission Statement that states: In order to create and sustain a safe, just and respectful learning environment in the Novato Unified

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conclusion that "Immigration" was within the scope of Smith's right to free speech. After publication, the Principal and the District apologized for that "misinterpretation and misapplication of" board policy.

School District, all individuals including students, staff, parents and community members shall be treated with dignity, respect and fairness. [¶] Earlier today we met informally with approximately 150 students and parents to discuss this issue and answer their questions. To provide a forum for the families who were not on campus today, we have scheduled a meeting tomorrow . . . in the Lecture Hall. [¶] In addition, we are meeting this afternoon with the faculty to review Board Policy and the Human Relations and Respect Mission Statement, which will be reviewed with students in class tomorrow."

Subsequently, the District instructed the teachers to review the speech policy and Mission Statement in class. The District also conducted a second meeting about "Immigration" the evening of November 15. Approximately 200 people attended. Students, parents, and staff expressed their dismay regarding "Immigration."

On November 14, a Latino student threatened to "kick [Andrew's] ass" for writing "Immigration." At the end of the month, Smith suffered a *chipped tooth* in an altercation with another Latino student. That same student subsequently threatened to kill Smith. The Principal was concerned about Smith's safety and asked him to report any threats or violence.

On December 4, 2001, the District Board of Trustees held a public meeting. The Principal reported on the events surrounding "Immigration." She stated that she had misinterpreted Board policy in

allowing "Immigration" to be published because Board policy allows student "rights of expression" to be limited "as allowed [] by law in order to maintain an orderly school environment and to protect the rights, health, and safety of all members of the school community." She further stated that she had "retracted the remaining copies of the paper" including "Immigration." Many students and parents spoke at the meeting, including Smith and his father.

In January 2002, issue two of *The Buzz* was published; Smith did not write anything for that issue. In late January or early February 2002, Smith submitted a second opinion editorial, entitled "Reverse Racism." The piece contained many provocative statements about race relations. For example, Smith reflected on the limited police and media reaction following an incident where a group of "minorit[ies]" beat him up, stating "Think of it, a group of 20 drunken males beating up one black kid. I would bet my life that the police or even the media would have handled it differently." He also asserted that O.J. Simpson would have been convicted if he had been white; expressed confusion about the "politically correct" names used to refer to "minorities;" and complained about "special privileges," "reverse discrimination," and "affirmative action."

The student editor-in-chief and the journalism teacher approved the piece for publication and included it in a draft layout for review by the Principal. The Principal sent a copy of "Reverse Racism" to the ACLU, which opined that it was protected speech.

Again, the Principal had concerns about the piece, but she approved it for publication. In light of the disruption that followed publication of "Immigration," the Principal thought it would be a good idea to publish a counter-viewpoint along with "Reverse Racism;" the Superintendent agreed. The Principal met with the journalism students to encourage them "to create a product that was balanced and fair and top quality." One of the strategies discussed was publishing a counter-viewpoint to Smith's opinion editorial. She did not require them to publish a counter-viewpoint. Because there was insufficient time for someone to write a counter-viewpoint before publication of the February 2002 issue of *The Buzz,* the students voted to move "Reverse Racism" to the next issue of the paper.

In the interim, "Reverse Racism" was published in the *Novato Advance,* a local newspaper not affiliated with the District. The newspaper reported that the opinion piece had been "removed" from *The Buzz.*

"Reverse Racism" was published in the May 2002 edition of *The Buzz.* There was also a counter-viewpoint entitled "It's About Time" and another opinion editorial by Smith entitled "Embrace Diversity?"

On May 2, 2002, plaintiffs filed the present action. In September, plaintiffs filed an amended complaint. The complaint alleged violations of Smith's right to free speech under the United States and California Constitutions and the California Education Code and challenged the District's speech

policies as facially invalid. Plaintiffs sought an injunction prohibiting further illegal infringement of speech and nominal damages of $1.00. Following a bench trial, the court found in favor of the District and the individual defendants on all causes of action. The judgment included an award of costs to the District.

We granted the request of the ACLU Foundation of Southern California and the Student Press Law Center to an file amicus curiae brief in support of plaintiffs.

DISCUSSION

I. *Summary of Relevant State and Federal Law*

The First Amendment of the United States Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech. . . ." Article I, section 2, subdivision (a) of the California Constitution guarantees that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The purpose of both provisions is "to abolish governmental censorship and to constitutionalize society's substantial interest in protecting the right to comment on issues of public concern." (*Lopez v. Tulare Joint Union High School Dist.* (1995) 34 Cal.App.4th 1302, 1309-1310, 40 Cal.Rptr.2d 762 (*Lopez*).)

Although the constitutional provisions do not expressly exclude students, students' free speech rights lacked judicial recognition until the landmark United States Supreme Court ruling *Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (*Tinker*). Previously, "it was generally accepted that school officials stood in the stead of parents, i.e., in loco parentis, and had parent-like authority to control student conduct and expression." (*Lopez, supra,* 34 Cal.App.4th at p. 1310, 40 Cal.Rptr.2d 762.) *Tinker* recognized the authority of public school officials to control student conduct but concluded that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker,* at p. 506.) *Tinker* held that a student may exercise the right to freedom of expression unless the "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ." (*Id.* at p. 513.) Any regulation prohibiting student expression "would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." (*Ibid.*) Although students' First Amendment rights had to be "applied in light of the special characteristics of the school environment," students could not be "confined to the expression of those sentiments that are officially approved." (*Tinker,* at pp. 506, 511; *see also Bright v. Los Angeles Unified Sch. Dist.* (1976) 18

Cal.3d 450, 455-460, 134 Cal.Rptr. 639, 556 P.2d 1090 (*Bright*) [discussing *Tinker*].)

Applying *Tinker, supra,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, a California federal district court found unconstitutional sections 9012 and 9013 of California's Education Code, which banned "partisan" and "propaganda" publications on high school campuses. (*Bright, supra,* 18 Cal.3d at pp. 457-458, 134 Cal.Rptr. 639, 556 P.2d 1090.) The California Legislature responded in 1971 by repealing sections 9012 and 9013 and enacting section 10611, "the nation's first statutory scheme for protecting students' free expression on school campuses." (*Lopez, supra,* 34 Cal.App.4th at p. 1311, 40 Cal.Rptr.2d 762; *see also Bright,* at p. 458, 134 Cal.Rptr. 639, 556 P.2d 1090.) In 1978, the Legislature replaced section 10611 with section 48907, which specifically protects student expression in official school publications. (*Lopez,* at p. 1312, 40 Cal.Rptr.2d 762.)

Section 48907 provides: "Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a

clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. [¶] Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction. [¶] Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section. [¶] There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section. [¶] 'Official school publications' refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee. [¶] Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school."

After reviewing the history of the enactment of section 48907, the *Lopez* court concluded that the statute "constitutes a statutory embodiment of the *Tinker* and related First Amendment cases at that time." (*Lopez, supra,* 34 Cal.App.4th at p. 1318, 40 Cal.Rptr.2d 762.)

Eight years after the enactment of section 48907, the United States Supreme Court held that the First Amendment did not prevent a school district from disciplining a high school student who gave a lewd speech at a school assembly. (*Bethel School Dist. No. 403 v. Fraser* (1986) 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549.) Subsequently, in *Hazelwood School District v. Kuhlmeier* (1988) 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (*Kuhlmeier*), the United Supreme Court held that under the First Amendment school officials retain relatively broad authority to regulate student speech in school sponsored publications. "[A] school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself,' [*Bethel School Dist.*, at p. 685] . . . from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." (*Kuhlmeier,* at p. 271.) In sum, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." (*Kuhlmeier,* at p. 273.)

Although *Kuhlmeier, supra,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 remains the controlling standard under the First Amendment for school sponsored speech, California courts have held that section 48907 provides broader protection for student speech in California public school newspapers. *Leeb v. DeLong* (1988) 198 Cal.App.3d 47, 54, 243 Cal.Rptr. 494 (*Leeb*) concluded that section 48907 confers editorial control of official student publications on the student editors alone, with very limited exceptions. The court held that as a matter of California statutory law, "[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is *not available to this state's educators.*" (*See also Lopez, supra,* 34 Cal.App.4th at pp. 1315, 1317-1320, 40 Cal.Rptr.2d 762; *McCarthy v. Fletcher* (1989) 207 Cal.App.3d 130, 146, fn. 3, 254 Cal.Rptr. 714; *California Teachers Assn. v. Governing Board* (1996) 45 Cal.App.4th 1383, 1388, fn. 3, 53 Cal.Rptr.2d 474.)[5]

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[5] *Leeb, supra,* 198 Cal.App.3d 47, 243 Cal.Rptr. 494 separately considered whether the California Constitution protects student speech in school newspapers more broadly than does the United States Constitution, as interpreted by *Kuhlmeier, supra,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592. *Leeb* construed *Bailey v. Loggins* (1982) 32 Cal.3d 907, 187 Cal.Rptr. 575, 654 P.2d 758 (a prison newspaper case) as rejecting as a matter of state constitutional law the approach to government sponsored speech later adopted by *Kuhlmeier.* (*Leeb,* at pp. 54-56, 243 Cal.Rptr. 494; *see also Lopez, supra,* 34 Cal.App.4th at pp. 1315-1316, 1318-1320, 40 Cal.Rptr.2d 762; *but see McCarthy v. Fletcher, supra,* 207 Cal.App.3d at p. 146, fn. 3, 254 Cal.Rptr.

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We note that *Leeb, supra,* 198 Cal.App.3d at p. 54, 243 Cal.Rptr. 494, did not take into account the language in section 48907 authorizing journalism advisers "to maintain professional standards of English and journalism." Under that language, educators may well be able to exercise some of the control over student speech in school newspapers permitted under *Kuhlmeier.* (*Kuhlmeier, supra,* 484 U.S. at p. 271.) The issue was not raised by the parties and we need not decide how the authority conferred to schools under the "professional standards" language in section 48907 differs from the authority recognized in *Kuhlmeier* (*see* Part III(b), below).

In 1992, the Legislature enacted section 48950, which provides further protections for student free speech rights. The section prohibits school districts from making or enforcing "any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication" that, if engaged in off campus, is protected from government restriction by the First Amendment or by article I, section 2 of the California Constitution. (§ 48950, subd. (a).) The Legislature also expressly reaffirmed section 48907, stating that nothing

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714 [emphasizing independent statutory ground for *Leeb* holding].) This issue is not squarely presented by the parties and we do not express any opinion on whether, in the absence of section 48907, the California Constitution would permit the restrictions on student speech permitted by *Kuhlmeier.*

in section 48950 may be construed to supersede, limit or modify the provisions of section 48907. (§ 48950, subd. (e).)

Against this legal and historical backdrop, we must determine: (1) whether "Immigration" is protected speech under section 48907 and (2) if so, whether the District's response to "Immigration" infringed on Smith's exercise of his right to free speech under the statute. We then consider whether the District infringed Smith's free speech rights with respect to "Reverse Racism," whether the individual defendants are entitled to immunity under Government Code section 820.2, and whether the District's speech policies are facially invalid.

II. *Standard of Review*

Statutory construction is a question of law we decide de novo. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699, 170 Cal.Rptr. 817, 621 P.2d 856.) Generally, the trial court's resolution of disputed factual issues is reviewed for substantial evidence. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983, 64 Cal.Rptr.2d 843, 938 P.2d 903.) However, where an issue implicates the First Amendment, the trial court's resolution of "constitutionally relevant facts" is subject to independent review by this court. (*See In re George T.* (2004) 33 Cal.4th 620, 631-634, 16 Cal.Rptr.3d 61, 93 P.3d 1007.)

The independent review standard arises from a reviewing court's obligation to make an independent examination of the whole record in order to insure that the judgment does not constitute a forbidden intrusion on free expression. (*In re George T., supra,* 33 Cal.4th at p. 631, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) "It is necessary 'because the reaches of the First Amendment are ultimately defined by facts it is held to embrace' and an appellate court must decide 'whether a given course of conduct falls on the near or far side of the line of constitutional protection.'" (*In re George T.,* at p. 632, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) *In re George T.* held that the independent review standard should be employed in determining whether speech characterized by a government entity as unprotected is in fact outside the scope of the right to free speech. (*Id.* at p. 633, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) Like the criminal threat statute, Penal Code section 422, at issue in *In re George T.,* section 48907 incorporates constitutional free speech standards. (*Lopez, supra,* 34 Cal.App.4th at p. 1318, 40 Cal.Rptr.2d 762; *see also Bright, supra,* 18 Cal.3d at pp. 458, 463, 134 Cal.Rptr. 639, 556 P.2d 1090.) We independently review whether "Immigration" is protected speech under section 48907. (*See In re George T.,* at p. 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) We independently review whether the District's response constituted infringement under section 48907 because that is another "constitutionally relevant fact" (*In re George T.,* at p. 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007) and because, as we

explain later, the Legislature incorporated constitutional standards for infringement into section 48907.

"Independent review is not the equivalent of de novo review 'in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue." (*In re George T., supra,* 33 Cal.4th at p. 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) We will defer to the trial court's credibility determinations but will make an independent examination of the whole record in determining the existence of the constitutionally relevant facts.

III. *Protected Speech Under Section 48907*

Plaintiffs contend that the District was not authorized to prohibit publication of "Immigration" under section 48907. In particular, they contend that contrary to the trial court's conclusion, the opinion editorial was not speech likely to incite disruption of the orderly operation of the high school. Resolution of this issue requires us to construe the meaning of the term "incites" as used in section 48907.

A. *Plain Meaning of "Incites" in Section 48907*

Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. (Code Civ. Proc., § 1859.) "'Our first step is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.'" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, 59 Cal.Rptr.2d 671, 927 P.2d 1175.) "'[W]e seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose. . . .'" (*Id.* at p. 634, 59 Cal.Rptr.2d 671, 927 P.2d 1175.) "If the words of a statute are reasonably free of ambiguity and uncertainty, we look no further than those words to determine the meaning of that language." (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1503, 82 Cal.Rptr.2d 368, citing *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 819, 226 Cal.Rptr. 81, 718 P.2d 68.)

The statutory language of section 48907 critical to our review follows: "Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school." (§ 48907.)

We resolve the statutory interpretation issue on the plain language alone. The Black's Law Dictionary definition of "incite" is "To arouse; urge; provoke; encourage; spur on; goad; stir up; instigate; set in

motion; as, to 'incite' a riot. Also, generally, in criminal law to instigate, persuade, or move another to commit a crime; in this sense nearly synonymous with 'abet.'" (Black's Law Dict. (6th ed.1990) p. 762, col. 2.) The definition focuses on conduct that is directed at achieving a certain result.

The established meaning of incite/incitement in California law is consistent with this understanding of the verb "to incite." In the criminal context the word "abets" means "to incite or encourage," as used in determining accomplice liability. (*People v. Elliott,* (1993) 14 Cal.App.4th 1633, 1641, 18 Cal.Rptr.2d 426; *see also People v. Bishop* (1988) 202 Cal.App.3d 273, 282, fn. 6, 248 Cal.Rptr. 678 [words alone might provide basis for criminal liability "if they amount to incitement, instigation, or advisement"].) The offense "incitement to riot" applies to a person who "engages in conduct that urges a riot, or urges others to commit acts of force or violence." (Penal Code, § 404.6, subd (a).) In upholding the constitutionality of the penal statute, the California Supreme Court held that the conduct necessary to establish incitement to riot "is neither similar nor comparable to speech which merely stirs to anger, invites public dispute, or brings about a condition of unrest." (*People v. Davis* (1968) 68 Cal.2d 481, 485, 67 Cal.Rptr. 547, 439 P.2d 651.)

Similarly, in *Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 142-143, 109 Cal.Rptr. 897, 514 P.2d 697, the Supreme Court narrowly interpreted a statute authorizing the exclusion of persons who have "willfully disrupted the orderly operation" of a college

campus. To preserve its constitutionality, the court interpreted Penal Code section 626.4 "to permit exclusion from the campus only of one whose conduct or words are such as to constitute, or incite to, a substantial and material physical disruption incompatible with the peaceful functioning of the academic institution and of those upon its campus." (*Braxton,* at p. 150, 109 Cal.Rptr. 897, 514 P.2d 697.) The court avoided a construction that would have permitted the exclusion of persons who caused a disruption simply through provocative speech that was offensive to the audience. (*Id.* at pp. 146-147, 109 Cal.Rptr. 897, 514 P.2d 697.) On this point, the court cited *Tinker, supra,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 and quoted *Terminiello v. Chicago* (1949) 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131, for the proposition that "'[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" (*Braxton,* at pp. 146-147, 109 Cal.Rptr. 897, 514 P.2d 697; *see also In re Brown* (1973) 9 Cal.3d 612, 623, 108 Cal.Rptr. 465, 510 P.2d 1017 [statute "prohibiting disturbing the peace by tumultuous and offensive conduct must be limited to disruption of public order by acts that are themselves violent or that tend to incite others to violence"].)

Olivia N. v. National Broadcasting Co. (1981) 126 Cal.App.3d 488, 178 Cal.Rptr. 888 drew a distinction between speech that incites violence, and speech that results in a copycat crime. The court held that a

television broadcaster could not constitutionally be held liable on theories of negligence and recklessness for broadcasting a film allegedly causing viewers to decide to commit a similar rape. Plaintiff was required to show "incitement," which she admittedly was unable to do. (*Olivia N.*, at pp. 491, 494-495, 178 Cal.Rptr. 888.) The court applied the test for incitement set forth in *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 and concluded that "incitement" referred to speech that "advocate[s] or encourage[s] violent acts" or speech that was "'directed to inciting or producing imminent lawless action.'" (*Olivia N.*, at pp. 491, 494-495, 178 Cal.Rptr. 888, quoting *Brandenburg,* at p. 447.) The court emphasized that "the United States Supreme Court has 'consistently held that the fact that protected speech may be offensive to some does not justify its suppression.'" (*Olivia N.*, at p. 495, 178 Cal.Rptr. 888, quoting *Carey v. Population Services International* (1977) 431 U.S. 678, 701, 97 S.Ct. 2010, 52 L.Ed.2d 675.)

The focus on *inciting* speech, rather than speech that may result in disruption or other harm, reflects what has come to be known as the "heckler's veto" rule: speech that seeks to communicate ideas, even in a provocative manner, may not be prohibited merely because of the disruption it may cause due to reactions by the speech's audience. (*O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 508, 44 Cal.Rptr.3d 531.) The Supreme Court has emphatically declared, "[i]f there is a bedrock principle

underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (*Texas v. Johnson* (1989) 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342; *see also Street v. New York* (1969) 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572; *Terminiello v. Chicago, supra,* 337 U.S. at pp. 4-5.) The "heckler's veto" rule is discussed in *Tinker, supra,* 393 U.S. at pp. 508-509, the Supreme Court's seminal decision on free speech in high schools. (*See also Boyd County High School v. Bd. of Educ. of Boyd* (2003) 258 F.Supp.2d 667, 689-690 [discussing *Tinker* and "heckler's veto" doctrine].) The right to free speech is constitutionally protected from "censorship by hostile reaction." (*San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 970, 74 Cal.Rptr.2d 364.)

We conclude that the plain language of section 48907 mandates that a school may not prohibit student speech simply because it presents controversial ideas and opponents of the speech are likely to cause disruption. Schools may only prohibit speech that incites disruption, either because it specifically calls for a disturbance or because the manner of expression (as opposed to the content of the ideas) is so inflammatory that the speech itself provokes the disturbance. "To many, the immediate consequence of this freedom [of speech] may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values that the process of open debate permits us to

achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." (*Cohen v. California* (1971) 403 U.S. 15, 24-25, 91 S.Ct. 1780, 29 L.Ed.2d 284.)[6]

B. *"Immigration" is Protected Speech Under Section 48907*

Even if we assume that the disruption that followed the publication of "Immigration" constituted

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[6] Although we do not rely on the legislative history of section 48907, it supports the conclusion that the Legislature intended to incorporate this understanding of "to incite" in enacting section 48907. Section 48907 "constitutes a statutory embodiment of the [*sic*] *Tinker*[, *supra,* 393 U.S. 503] and related First Amendment cases at that time" (*Lopez, supra,* 34 Cal.App.4th at p. 1318, 40 Cal.Rptr.2d 762; *see also Bright, supra,* 18 Cal.3d at pp. 458, 463, 134 Cal.Rptr. 639, 556 P.2d 1090). The Legislature's choice of the verb "to incite" likely resulted from the frequent use of "incite" and "incitement" in the United States Supreme Court's "fighting words" cases. (*See, e.g., Cohen v. California, supra,* 403 U.S. at p. 18; *Brandenburg v. Ohio, supra,* 395 U.S. at p. 447; *Feiner v. New York* (1951) 340 U.S. 315, 321, 71 S.Ct. 303, 95 L.Ed. 295; *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 571-572, 62 S.Ct. 766, 86 L.Ed. 1031; *see also Lopez,* at pp. 1317-1318, 40 Cal.Rptr.2d 762 [summarizing legislative history indicating that Legislature considered constitutional case law in drafting section 48907].) These cases and their progeny are the same cases underlying the "heckler's veto" rule and the California incitement cases discussed previously.

"substantial disruption of the orderly operation of the school" and that there was a "clear and present danger" of disruption as required by section 48907, Smith's opinion editorial could only be prohibited under section 48907 if it *incited* the disruption.

The editorial is a communication of ideas, the expression of a viewpoint on an emotionally debated contemporary issue. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." (*Street v. New York, supra,* 394 U.S. at p. 592.) "Immigration" suggests that a significant proportion of undocumented immigrants are criminals and that any person who cannot speak English should be suspected of being an undocumented immigrant. Although "Immigration" communicates Smith's viewpoint in a disrespectful and unsophisticated manner, it contains no direct provocation or racial epithets. We conclude that "Immigration" was not inciting speech that the District was authorized to prohibit under section 48907. We cannot allow the reactions to "Immigration" by the reading audience (that is, the "heckler's veto") to silence Smith's communication of unpopular views. "Immigration" is protected speech.

The District contends that "Immigration" was incitement because Smith testified that his purpose in writing the opinion editorial was to get people "pissed off" and he wanted a "response . . . that would cause action." However, his express purpose is not

evidence that he intended to cause substantial disruption of the school, as opposed to other action, such as enforcement of the immigration laws. "Immigration" ends with such a call to political action: "I feel like there has to be some major reforms in immigration policy. I just hope it happens before our country rots from within."

Our conclusion does not mean that the District lacked authority to teach writing and journalism standards. The statute provides schools some authority to control student speech in school newspapers. Section 48907 makes it the responsibility of student journalism advisers "to maintain professional standards of English and journalism." For example, this responsibility permits the prohibition of profanities in official school publications. (*Lopez, supra,* 34 Cal.App.4th at pp. 1323-1327, 40 Cal.Rptr.2d 762.) It likely authorizes journalism advisers to restrict the publication of student writings that are ungrammatical, poorly written, or inadequately researched.

We need not determine the scope of the "professional standards" provision in section 48907 because we are not here confronted with circumstances in which a journalism adviser sought to improve the journalistic quality of a student piece and the student refused the suggestions. To the contrary, Smith accepted the only pre-publication suggestions made to him regarding "Immigration," to wit, the journalism teacher's suggestion that he state where he got his facts about the requirements for citizenship and the Principal's request that he remove the word "Hell"

from the opinion editorial. Although section 48907 permits schools to engage with student journalists regarding the linguistic and journalistic merits of their work, that is not what happened here.

IV. *The District's Response Infringed Smith's Right to Free Speech*

The trial court concluded that there was no infringement of Smith's right to free speech regarding "Immigration" because the piece was published and Smith was not disciplined for writing it. The court misconstrued the scope of protection of free speech accorded by section 48907.

A. *The Standard for Determining Infringement*

Before the enactment of section 48907, it was established that "constitutional violations may arise from the deterrent or 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." (*Laird v. Tatum* (1972) 408 U.S. 1, 11, 92 S.Ct. 2318, 33 L.Ed.2d 154; *see also Adcock v. Board of Education* (1973) 10 Cal.3d 60, 66, 109 Cal.Rptr. 676, 513 P.2d 900.) A violation of free speech rights may be established where a governmental response to speech "would chill or silence a person of ordinary firmness from future First Amendment activities." (*Mendocino Environmental Center v. Mendocino County* (9th Cir.1999) 192 F.3d 1283, 1300; *see also Bennett v. Hendrix* (11th Cir.2005) 423 F.3d 1247, 1254.)

The rationale for the "person of ordinary firmness" test is set forth in *Bennett v. Hendrix, supra,* 423 F.3d at pages 1251-1252, where the court explained that "[a]n objective standard provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights. In contrast, 'a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight.' [Citation.] '[I]t would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity. . . . ' [Citation.] There is no reason to 'reward' government officials for picking on unusually hardy speakers. At the same time, we recognize that government officials should not be liable when the plaintiff is unreasonably weak-willed or suffers only a '*de minimis* inconvenience to her exercise of First Amendment rights.' [Citations.] The 'ordinary firmness' test is therefore protective of the interests of both government officials and plaintiffs alleging retaliation."

Because the California Legislature intended to incorporate constitutional standards into section 48907 (*Lopez, supra,* 34 Cal.App.4th at p. 1318, 40 Cal.Rptr.2d 762), we construe section 48907 as incorporating the same standard for determining infringement of the right to free speech applicable under the United States Constitution. That is, a governmental response that would constitute a

violation of a student's free speech rights under the First Amendment would also constitute a violation of a student's right to exercise freedom of speech under section 48907.

B. *The District Responses to "Immigration"*

1. *The District's Effort to Facilitate Responsive Speech*

The District facilitated the protesting students' response to "Immigration" by holding an assembly the morning after the newspaper came out. At that meeting, parents and the students who had left their classes were able to express their reactions to "Immigration," both orally and in writing. A similar meeting was held at the school the evening of November 15. Plaintiffs contend that by providing a forum for expression of the protestors' viewpoint the District facilitated a "heckler's veto" and infringed Smith's right to free speech. Plaintiffs further contend that on November 14 the District should have disciplined the students who left class and enforced rules limiting parental access to campus.

We disagree. The District did not infringe Smith's right to free speech by holding meetings that provided an opportunity for the protestors to express their reactions to "Immigration." It is quite the opposite. By enabling the protestors to respond to offensive speech with their viewpoint, the District modeled the civil discourse education should foster. "'The vigilant protection of constitutional freedoms is

nowhere more vital than in the community of American schools.' [Citation.] It is the classroom and academic institutions which are the marketplace of ideas and where the exchange of ideas and arguments are to be fostered, not curtailed." (*Adcock v. Board of Education, supra,* 10 Cal.3d at p. 67, 109 Cal.Rptr. 676, 513 P.2d 900; *see also Tinker, supra,* 393 U.S. at p. 512.)

None of the cases cited by plaintiffs support the proposition that a school infringes on a student's right to free speech merely by facilitating a peaceful avenue for self-expression by persons upset by the student's speech. We decline to adopt a rule contrary to our nation's traditions of open debate.

2. *The District Did Not Discipline Smith*

It is undisputed that Smith was never suspended or formally disciplined for authoring "Immigration." Plaintiffs contend that the District November 14 letter constituted discipline because it publicly conveyed the District's disagreement with "Immigration" and chastised Smith for writing it. It did neither.

A school response expressing strong disapproval of the content of a student's speech may in some circumstances amount to censure of the student and thereby constitute infringement of free speech. (*See Holloman ex rel. Holloman v. Harland* (11th Cir.2004) 370 F.3d 1252, 1268-1269 (*Holloman*).) In *Holloman,* the plaintiff refused to say the Pledge of Allegiance and his teacher singled him out in front of his entire

class, "subjecting him to embarrassment and humiliation." (*Id.* at p. 1269.)

In contrast, the District letter disavowing Smith's viewpoint did not constitute censure. The District was in the difficult position of balancing Smith's free speech rights with the need to foster an educational environment of respect for all students. There is no evidence that the District engaged in the type of in-class singling out involved in *Holloman, supra,* 370 F.3d 1252. Although it was undoubtedly clear that the November 14 letter referred to "Immigration," the District's decision not to use Smith's name depersonalized the issue.

A speaker who chooses to speak in a provocative manner cannot complain of infringement simply because some degree of attention is directed toward him. In the letter, the District acknowledged the understandable distress experienced by the Latino students and parents and expressed its "deepest regrets for the hurt and anger" generated by "Immigration." Some degree of negative inference about "Immigration" was inevitable in that context, but the District's letter does not directly criticize Smith. None of plaintiffs' cases support a conclusion that the District's response constituted censure.

We conclude the District's efforts to give the protestors a forum, to acknowledge the legitimacy of

their reactions, and to distance itself from Smith's viewpoint was not a censure or discipline of Smith.[7]

3. *The District Did Violate Section 48907 By Announcing that "Immigration" Is Not Protected Speech*

Unfortunately, the District response included announcing that the District should never have published "Immigration" and ordering that remaining copies of *The Buzz* be retracted. In so doing, the District violated section 48907.

In its November 14, 2001 letter, the District stated that "Immigration" "should not have been printed" because it violated the District's policy regarding student publications and the District's "Human Relations and Respect Mission Statement." The letter quoted a portion of the District's speech policy that states "Students' rights of expression shall be limited only as allowed [] by law in order to maintain an orderly school environment and to protect the rights, health, and safety of all members of the school community." The letter also quoted a portion of the District's Mission Statement stating that "all individuals, including students, staff, parents and community members shall be treated with dignity, respect and fairness." The clear message of the letter

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[7] Because there was no disciplinary sanction, there was no violation of section 48950. (*See Lopez, supra,* 34 Cal.App.4th at pp. 1330, 40 Cal.Rptr.2d 762.)

was that "Immigration" was outside the scope of Smith's "rights of expression" and that future speech similar to "Immigration" would not be tolerated.

The message of the November 14 letter was reinforced when the teachers reviewed the speech policy and Mission Statement in class, and again at the December 4 public District Board of Trustees meeting when the Principal stated that "Immigration" could have been prohibited in order to "maintain an orderly school environment and to protect the rights, health, and safety of all members of the school community." She further emphasized the point in stating that she had "retracted the remaining copies of the paper" including "Immigration."

The District speech policy, at least as construed in the November 14 letter, constitutes regulatory government action that may result in an actionable chill, and the threat of censorship implicit in the letter is a legally cognizable harm. (*O'Keefe v. Van Boening* (9th Cir.1996) 82 F.3d 322, 325.) At a minimum, the District's response had the effect of chilling any further dissemination of the protected message in "Immigration." "[T]he right to free speech protects not only the content but the dissemination and circulation of the material as well." (*Bright, supra,* 18 Cal.3d at p. 466, 134 Cal.Rptr. 639, 556 P.2d 1090.) Although the record is ambiguous as to whether copies of the paper were actually retracted, it is clear that as of November 14 there were no more copies of *The Buzz* containing "Immigration" available on campus. If Smith wanted to continue to express the ideas in

"Immigration" he needed to copy and disseminate the opinion editorial on his own. To do so would have amounted to open defiance of the Principal and Superintendent. At the very least the District's actions threatened that any future efforts to distribute "Immigration" would be censored. (Cf. *Sypniewski v. Warren Hills Regional Bd. of Educ.* (3d Cir.2002) 307 F.3d 243, 251-252 [considering motion for preliminary injunction to prevent enforcement of racial harassment policy to prohibit wearing of shirt where, after shirt was allowed to be worn, school district indicated that "in hindsight" shirt should have been prohibited].)

We reject any suggestion that the District's response was merely a "'*de minimis* inconvenience'" to Smith's exercise of his free speech rights. (*Bennett v. Hendrix, supra,* 423 F.3d at p. 1252.) That phrase refers to government responses to protected speech that are so insignificant that they cannot be viewed as adequate to chill or silence a person of ordinary firmness. (*Bart v. Telford* (7th Cir.1982) 677 F.2d 622, 625 [noting, for example, that an action cannot be based on allegations that an authority figure frowned at the plaintiff in response to the speech activity].) We conclude that the District's response to "Immigration" would have a significant impact on a person of ordinary firmness. The November 14 letter and subsequent actions constituted an official interpretation of the District's speech policy and communicated to Smith that "Immigration" was not within his "rights to expression" on campus. In doing so, the

District inaccurately represented the scope of Smith's right to free speech. The letter was handed out to the entire student body and it was signed by the Principal and Superintendent, who are authority figures with substantial discretionary powers and whose words "carry a presumption of legitimacy." (*Holloman, supra,* 370 F.3d at p. 1269.)

Such an advisory opinion can constitute the suppression of free speech. For example, in *Bantam Books, Inc. v. Sullivan* (1963) 372 U.S. 58, 61, 66-67, 83 S.Ct. 631, 9 L.Ed.2d 584, the United States Supreme Court concluded that letters from a state commission on morality advising book distributors that the commission's members considered certain books objectionable for sale to youths constituted "informal censorship" in violation the First Amendment even though the books were not banned and the commission lacked authority to apply legal sanctions. The court concluded that the practice amounted to a "system of prior administrative restraints, since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned." (*Bantam,* at p. 70.)

In considering the legal effect of the District's response, we must keep in mind that the hypothetical "person of ordinary firmness" or resolve is a teenager, still developing self-confidence and intellectual independence, still subject to peer pressure and more likely to be intimidated by authority. (*See Bennett v. Hendrix, supra,* 423 F.3d at p. 1252 [noting that the

analysis "focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts"].) For these reasons, on the whole, high school students are more likely to be chilled by a school's display of authority. A person of ordinary firmness would have been chilled from openly defying the Principal and Superintendent by repeating on campus the views expressed in "Immigration." That suppression of Smith's viewpoint is sufficient to establish infringement in this case. (*See Bart v. Telford, supra,* 677 F.2d at p. 625 [the effect on freedom of speech "need not be great in order to be actionable"].)

To conclude otherwise would permit a school to suppress future protected speech by characterizing past speech as unprotected, as long as the school did not actually censor the past speech. The effect would be to limit students' right to free speech on controversial topics to a one-time event, or at least to suppress the controversial speech until a particularly stubborn and persistent speaker (like Smith when he submitted "Reverse Racism") comes along to test the school's resolve, or until the passage of enough time to diminish the power of the school's admonition. The right of free speech is not subject to such manipulation and diminishment. "Disharmony and friction are the healthy but natural results of a society which cherishes the right to speak freely on a subject and these resultant by-products should never prevent an individual from speaking or cause that individual to be

penalized for such speech. Any attempt to do so abrogates the protections that the First Amendment affords to all." (*Adcock v. Board of Education, supra,* 10 Cal.3d at p. 68, 109 Cal.Rptr. 676, 513 P.2d 900.)

4. *Conclusion*

The District's response to the tumult caused by "Immigration" was essentially two-fold. The District attempted to ease the distress of the protestors by distancing itself from Smith's opinion editorial and by providing the protestors opportunities to express their views on "Immigration." This was wholly consistent with free speech values and it is likely that, viewed as a whole, the publication of "Immigration" resulted in a useful exchange regarding how different persons and communities might view the sensitive topic of illegal immigration. (*See Tinker, supra,* 393 U.S. at p. 512; *Bright, supra,* 18 Cal.3d at p. 456, 134 Cal.Rptr. 639, 556 P.2d 1090.) Even if Smith or the most belligerent protestors learned little from the process, it is likely that the school community gained understanding of the issues. For example, following publication of "Immigration" some students formed a group called Todos Unidos (Everyone United), in order "to help our students understand the meaning of different cultures."[8]

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[8] Similarly, the first public speaker at the District's December 4 Board of Trustee meeting stated, "I want to start by acknowledging the pain, the harm, the discomfort, that came as

(Continued on following page)

On the other hand, the District sent the clear message that no further speech similar to "Immigration" would be tolerated. In the aftermath of "Immigration" the District succumbed to the fear of disruption and discontent. While understandable, this was not permissible. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago* [*supra,* 337 U.S. 1]; and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively

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a result of the article that was published in Buzz. I love what happened as a result. [¶] I love that the community has come together. There's been open dialogue. There are programs for the future that the students are involved, that the students are part of the exchange of ideas and the solutions to the long-term problems, which are lack of dignity and respect for every single member of their community." A parent at the meeting stated, "I would like to thank Andrew Smith for writing that article because he does have the freedom of speech, but he brought us [immigrants] together very close. [¶] We're now united like we should be from the get-go. I'm sorry it took this to get us where we're at now, but thank you, Andrew."

permissive, often disputatious, society." (*Tinker, supra,* 393 U.S. at pp. 508-509; *see also Bright, supra,* 18 Cal.3d at p. 456, 134 Cal.Rptr. 639, 556 P.2d 1090.) It is particularly troubling that the Superintendent issued the order to retract copies of *The Buzz* before he even read the opinion editorial. When faced with offensive student speech, school districts must proceed cautiously with due regard to the valuable rights at stake, rather than reacting impulsively because of protest about the speech.

It is to the District's credit that it resisted the temptation to censor Smith's second, similarly provocative opinion editorial, "Reverse Racism," which was published about six months later, in May 2002. Nevertheless, we are bound to conclude that the District's response to "Immigration" infringed on Smith's right to exercise freedom of speech and violated section 48907. (*See Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 480, 239 Cal.Rptr. 549, quoting *Elrod v. Burns* (1976) 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 [" 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' "].)

V.-VII.**

******UNPUBLISHED TEXT FOLLOWS******

[The following material is not certified for publication under California Rules of Court, rules 8.1105 and 8.1110.]

V. *The District Did Not Infringe Smith's Right to Free Speech Vis-à-vis Reverse Racism*

In early February 2002, Smith submitted "Reverse Racism" for publication in *The Buzz*. It was included in a draft layout for review by the Principal. The Principal sent a copy of "Reverse Racism" to the ACLU which opined that was protected speech. Plaintiffs contend that the District subsequently infringed Smith's right to free speech by requiring the journalism class to publish "Reverse Racism" with a counter-viewpoint. They contend that the District's requirement led to the exclusion of the piece from the February 2002 edition of *The Buzz*. Plaintiffs' argument is without merit.

The trial court found that the Principal "admonished the journalism class to be careful about their articles and told them about ways to handle controversy" and that she "recommended, but never requested or required, that they consider publishing a counter-viewpoint along with *Reverse Racism*." The court continued, "[t]he choice was the students'

** *See* footnote *, *ante*.

whether to publish a counter-viewpoint; it was not a directive of either the school or the District that they do so. The students thereupon voted to publish a counter-viewpoint with *Reverse Racism*. . . . Since there was insufficient time for someone to write a counter-viewpoint before the publication of the February 2002 edition of *The Buzz*, the students moved *Reverse Racism* to the next edition of the newspaper."

The evidence supports the trial court finding. The Principal testified unequivocally that she never required that "Reverse Racism" be published with a counter-viewpoint. The trial court found her testimony credible. Smith testified vaguely that the journalism class was "given the choice" of pulling Smith's opinion editorial or delaying publication of *The Buzz* until a counter-viewpoint was obtained. The trial court evidently found his testimony less credible. We defer to the trial court's credibility determinations. (*In re George T., supra*, 33 Cal.4th at p. 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007.)

Plaintiffs particularly rely on a letter to the editor published by the *Novato Advance* after that newspaper printed "Reverse Racism" with the assertion that the piece was "removed" from *The Buzz*. In the letter, District Board of Trustee President Ross Millerick stated that "To encourage student discussion rather than school disruption, the District required the student newspaper, *The Buzz*, to provide balance to Andrew's piece by also publishing a counterpoint piece in the same edition." At trial, the Board President admitted that he had no direct knowledge

of the circumstances surrounding removal of "Reverse Racism" from the February 2002 edition and that he had no knowledge of the District "insisting or demanding" removal of the piece. The trial court correctly ruled that the Board President's letter was hearsay.

Substantial evidence supports the finding that the District did not require that "Reverse Racism" be published with a counter-viewpoint. (*In re George T, supra*, 33 Cal.4th at p. 634, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) The District's conduct relating to "Reverse Racism" did not infringe Smith's right to free speech.[9]

VI. *The Individual Defendants are Not Entitled to Immunity*

The trial court concluded that the individual defendants, Principal Schwartz and Superintendent Bernard, are entitled to immunity under Government Code section 820.2. Our reading of the law requires us to disagree.

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[9] Plaintiffs argue for the first time in their reply brief that the District infringed on Smith's right to free speech by "setting up a heightened review process" for Smith's articles. We do not address arguments raised for the first time in a reply brief. (*People v. Thomas* (1995) 38 Cal.App.4th 1331, 1333, fn. 1, 45 Cal.Rptr.2d 610.) Further, this contention has been waived because it was not presented to the trial court. (*Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 530, 25 Cal.Rptr.3d 649.)

Public employees are immune from liability for their discretionary acts within the scope of their employment. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 788, 73 Cal.Rptr. 240, 447 P.2d 352.) Government Code section 820.2 provides that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." The Supreme Court has construed the term "discretion" narrowly. "[N]ot all acts requiring a public employee to choose among alternatives entail the use of 'discretion' within the meaning of section 820.2." (*Barner v. Leeds* (2000) 24 Cal.4th 676, 684-685, 102 Cal.Rptr.2d 97, 13 P.3d 704.) Immunity is reserved for "basic policy decisions" by governmental entities. (*Id.* at p. 685, 102 Cal.Rptr.2d 97, 13 P.3d 704.) "'Such "areas of quasi-legislative policy-making . . . are sufficiently sensitive" [citation] to call for judicial abstention from interference that "might even in the first instance affect the coordinate body's decision-making process." 'On the other hand, there is no basis for immunizing lower level decisions that merely implement a basic policy already formulated. The scope of the discretionary act immunity 'should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions.'" (*Ibid.*, citations omitted.) The Legislature has implicitly

endorsed this narrow interpretation of Government Code section 820.2. (*Johnson v. State of California*, at p. 685.)[10]

The District retains little basic policymaking discretion under section 48907. The critical decision whether to prohibit certain kinds of speech on campus was not entrusted to the District but was assumed by the Legislature in enacting section 48907. The provisions of section 48907 are incorporated into Board Policy 5145.2. The only authority granted to the Principal and Superintendent was to decide whether "Immigration" fell within one of the categories of speech that could be prohibited under section 48907, as reflected in Board Policy 5145.2. The Principal and Superintendent lacked discretion to prohibit any speech permitted by section 48907, or even to permit any speech prohibited by section 48907. (§ 48907.) The Principal and Superintendent made their determination that "Immigration" violated the District's speech policies in the span of a few hours,

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[10] Immunity under Government Code section 820.2 is construed narrowly because under Government Code section 815.2, subdivision (b), the immunity of a government entity corresponds to that of its employee. (*Johnson v. State of California, supra*, 69 Cal.2d at p. 787, 73 Cal.Rptr. 240, 447 P.2d 352; *see also Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1216, fn. 38, 48 Cal.Rptr.3d 108, 141 P.3d 225; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1361, 132 Cal.Rptr.2d 748.) Thus, to confer broad immunity on individual government employees would result in plaintiffs being unable to recover from the government in tort. (*See Johnson*, at pp. 797-798.)

and nothing in the record reflects any consultation with the Board of Trustees or counsel. In fact, the Superintendent directed the Principal to retract *The Buzz* immediately upon learning of the protests and without ever reading the opinion editorial.[11] This was not the sensitive "quasi-legislative policy-making" the Legislature intended to immunize. (*Barner v. Leeds, supra,* 24 Cal.4th at p. 685, 102 Cal.Rptr.2d 97, 13 P.3d 704.) The individual defendants' actions were a flawed attempt to implement the speech policies adopted by the District. (*Ibid.*)

This case is in marked contrast to *DiLoreto v. Board of Education* (1999) 74 Cal.App.4th 267, 282, 87 Cal.Rptr.2d 791, cited by the District. There, as a fundraiser, the school district solicited commercial advertisements to be posted on the school's baseball field. (*Id.* at p. 272, 87 Cal.Rptr.2d 791.) An individual wanted to post a sign that prominently displayed the Ten Commandments. (*Id.* at pp. 272-273, 87 Cal.Rptr.2d 791.) The superintendent was concerned that the district would be sued if the sign were posted on the school field. (*Id.* at p. 273, 87 Cal.Rptr.2d 791.) There followed an extensive process of deliberation

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[11] *Johnson* instructs that to be entitled to immunity there must be a showing that a policy decision involving a conscious balancing of risks and advantages actually took place. (*Johnson, supra*, 69 Cal.2d at p. 795, fn. 8, 73 Cal.Rptr. 240, 447 P.2d 352.) "The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision." (*Ibid.*; *see also Bell v. California* (1998) 63 Cal.App.4th 919, 929, 74 Cal.Rptr.2d 541.)

involving the principal, the superintendent, the school board president, and another school board member; and the individual seeking to post the sign obtained a favorable opinion from the California Attorney General. (*Ibid.*) Ultimately, the school took down all the advertisements and discontinued the fundraiser. (*Ibid.*) The individual sued the school and the court of appeal concluded that the individual defendants were immune under Government Code section 820.2. *DiLoreto*, at p. 282, 87 Cal.Rptr.2d 791.)

DiLoreto v. Board of Education, supra, 74 Cal.App.4th 267, 87 Cal.Rptr.2d 791 provides instruction for the instant case because there the situation was not covered by any existing policy and the actions underlying the suit took place only after an extensive process equivalent to basic policy making, whereas the situation at Novato High School *was* covered by existing policy and the District's basic response was crafted by the individual defendants quickly and informally. The fact that the Principal and Superintendent may have exercised their professional judgment in responding to "Immigration" is not dispositive. Numerous cases have found no immunity under Government Code section 820.2 despite the fact that the individual defendant's conduct involved exercise of considerable skill and judgment, and selection of a course of action among complex alternatives. (*See Barner v. Leeds, supra*, 24 Cal.4th at pp. 686-688, 102 Cal.Rptr.2d 97, 13 P.3d 704 [collecting and discussing cases].) We are compelled to follow these cases and conclude that the conduct of the

individual defendants is not within the scope of Government Code section 820.2 immunity.[12]

VII. *Plaintiffs' Overbreadth and Vagueness Claims*

Plaintiffs next contend that aspects of the District speech policies are facially invalid because they are unconstitutional and inconsistent with section 48907. The policies at issue are Board Policy 5145.2, Administrative Rule 5145.2, and the District's "Human Relations and Respect Mission Statement." Because plaintiffs do not contend that the United States or California Constitutions are broader than section 48907, our analysis under section 48907 is sufficient to address plaintiffs' claims. (*See Bright, supra*, 18 Cal.3d at pp. 466-467, 134 Cal.Rptr. 639, 556 P.2d 1090.)

A. *Board Policy 5145.2*

The most important of the three policies is Board Policy 5145.2, the District's "Freedom of Speech/Expression: Publications Code." Board Policy 5145.2 provides in relevant part: "Students' rights of

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[12] Our conclusion that the individual defendants are not immune does not mean that they will be forced personally to pay the judgment. California law generally requires public entities to pay judgments against their employees acting within the scope of their employment. (Gov.Code, §§ 825 et seq.; *see also Barner v. Leeds, supra*, 24 Cal.4th at pp. 690-691, 102 Cal.Rptr.2d 97, 13 P.3d 704; *Johnson v. California, supra*, 69 Cal.2d at p. 792, 73 Cal.Rptr. 240, 447 P.2d 352.)

expression shall be limited only as allowed by law in order to maintain an orderly school environment and to protect the rights, health and safety of all members of the school community. [¶] Prohibited are any expression or materials which are obscene, libelous, slanderous or constitute sexual harassment, or that create a clear and present danger that students will be incited to commit unlawful acts on school premises, to violate school rules, or to substantially disrupt the orderly operation of the school (EC 48907)[.¶] Also prohibited are expressions or materials which constitute harassment, threats or intimidation based on race, national origin, religion, gender, ancestry, disability, sexual preference or the perception that a group or person has those characteristics. (EC 48900.3)[.]"

Plaintiffs challenge the language in Board Policy 5145.2 that appears to permit the prohibition of student expression "in order to maintain an orderly school environment and to protect the rights, health and safety of all members of the school community." That challenge is easily rejected, because the same sentence states that students' rights "shall be limited only as allowed by law." On its face the challenged language does not purport to prohibit any particular speech; it states the purposes for which speech will be restricted, where the law permits prohibition of the speech. The next paragraph of Board Policy 5145.2 lists prohibited categories of speech also prohibited

under section 48907.[13] Plaintiffs do not explain how the policy provision can violate section 48907 when it adopts the same language as the statute.

More problematic is the paragraph prohibiting "expressions or materials which constitute harassment, threats or intimidation based on" the listed protected characteristics. This prohibition arguably raises serious constitutional problems because it may prohibit speech that is protected under *Tinker, supra*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (*see Saxe v. State College Area School District* (3rd Cir.2001) 240 F.3d 200, 216-217 (*Saxe*)) and because the terms may be unconstitutionally vague (*see Ketchens v. Reiner, supra*, 194 Cal.App.3d at pp. 477-478, 239 Cal.Rptr. 549). (*See also In re George T., supra*, 33 Cal.4th at pp. 631-633, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) However, when a statute or regulation is challenged, it should be interpreted to avoid constitutional difficulties. (*Edward J. DeBartolo Corp. v. Fla.*

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[13] The paragraph also prohibits materials that constitute "sexual harassment," which is not mentioned in section 48907. Plaintiffs reference the phrase but fail to support any challenge to its inclusion in Board Policy 5145.2 with reasoned argument and citation of authority. We deem any such challenge waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785, 79 Cal.Rptr.2d 273.)

We also treat as waived plaintiffs' argument relating to the District's purported failure to follow the dispute resolution procedure in District Administrative Rule 5145.2. The point is too undeveloped and unsupported to constitute a reasoned argument on the issue. (*Badie v. Bank of America, supra*, 67 Cal.App.4th at pp. 784-785, 79 Cal.Rptr.2d 273.)

Gulf Coast Trades Council (1988) 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (*DeBartolo Corp.*).) "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (*Ibid.*; *see also Saxe, supra*, 240 F.3d at p. 215 [applying the rule in interpreting a school district's harassment policy].) This rule reflects, in part, "the prudential concern that constitutional issues not be needlessly confronted." (*DeBartolo Corp.*, at p. 575.) Because section 48907 incorporates constitutional standards, we will apply any reasonable limiting construction in determining whether Board Policy 5145.2 is consistent with section 48907.

Board Policy 5145.2 contains a logical saving construction because it cites section 48900.3 to justify its prohibition on "harassment, threats or intimidation." Section 48900.3 provides that a student may be suspended if the student "has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in subdivision (e) of Section 233." Section 233 cross-references provisions of the Penal Code, including Penal Code section 422.6, subdivision (a), which provides that "No person . . . shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of" a protected characteristic. The

section also provides that "no person may be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat." (Pen.Code, § 422.6, subd. (c).)

We construe Board Policy 5145.2 as incorporating the prohibition on "hate violence" in Education Code section 48900.3, as that term is defined in Education Code section 233 and Penal Code section 422.6. Construed as such, the policy does not implicate any of the constitutional concerns identified by plaintiffs or the courts in *Saxe, supra*, 240 F.3d at pp. 216-217 and *Ketchens v. Reiner, supra*, 194 Cal.App.3d at pp. 477-478, 239 Cal.Rptr. 549. It does not violate section 48907 because speech amounting to hate violence would present a clear and present danger of inciting the commission of unlawful acts on school premises.[14]

B. *The District Mission Statement*

Plaintiffs also contend that the District "Human Relations and Respect Mission Statement" is

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[14] Plaintiffs and amici challenge the District's Administrative Rule 5145.2 on overbreadth and vagueness grounds. Additionally, plaintiffs challenge the District's pre-publication review process. These arguments were not presented to the trial court and may not be raised for the first time on appeal. (*Honig v. San Francisco Planning Dept., supra*, 127 Cal.App.4th at p. 530, 25 Cal.Rptr.3d 649.)

overbroad and vague because it provides that all members of the school community "[s]hall be treated with dignity, respect and fairness" and "[s]hall promote positive human relations, value differences and recognize similarities by modeling acceptance and inclusion of all individuals within the school community."

If we were to construe the Mission Statement to mean that all speech contrary to its broad and general directives is prohibited, it would raise serious statutory and constitutional problems. (*See, e.g.*, § 48907; *Tinker, supra*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731; *Saxe, supra*, 240 F.3d at pp. 216-217; *Ketchens v. Reiner, supra*, 194 Cal.App.3d at pp. 477-478, 239 Cal.Rptr. 549; *In re George T., supra*, 33 Cal.4th at pp. 631-633, 16 Cal.Rptr.3d 61, 93 P.3d 1007.) We avoid these constitutional difficulties *DeBartolo Corp., supra*, 485 U.S. at p. 575) by viewing the Mission Statement as it logically was meant to be viewed, as a general declaration of philosophical goals rather than as a set of specific and enforceable speech regulations. Otherwise, the specific and relatively narrow speech regulations in Board Policy 5145.2 would be rendered a nullity. Under this interpretation, it is Board Policy 5145.2, and not the District's Mission Statement, that regulates student free speech on campus.

[The preceding material is not certified for publication under California Rules of Court, rules 8.1105 and 8.1110.]

******END OF UNPUBLISHED TEXT******

DISPOSITION

The trial court judgment is reversed and remanded for proceedings consistent with this decision.

We concur. SIMONS, Acting P.J., and NEEDHAM, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ANDREW D. SMITH et al., Plaintiffs and Appellants, v. NOVATO UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	A112083 (Marin County Super. Ct. No. CV022210) (Filed June 20, 2007)

BY THE COURT:

Part V of the opinion filed May 21, 2007 is modified by deleting the last sentence of the second paragraph on page 27, which reads: "The trial court correctly ruled that the Board President's letter was hearsay."

The modification does not affect the judgment.

Date: Jun. 20, 2007 JONES, PJ

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN

ANDREW D. SMITH, a Student, and DALE R. SMITH, a Parent and a Taxpayer, Plaintiffs and Petitioners, vs. NOVATO UNIFIED SCHOOL DISTRICT; DR. JOHN BERNARD, in his official capacity as Superintendent of Novato Unified School District; LISA SCHWARTZ, in her official capacity as Principal of Novato High School; and DOES 1-50, Defendants and Respondents.	Case Number: CV022210 [PROPOSED] STATEMENT OF DECISION [California *Rules of Court*, Rule 232; California *Code of Civil Procedure* §632] (Filed Aug. 26, 2005)

I. THE FACTS

Novato High School and San Marin High School are the two comprehensive high schools within the Novato Unified School District ("District").

Plaintiff Andrew D. Smith[1] was enrolled in Novato High School, a public school in the District

[1] For ease of reference, plaintiff Andrew D. Smith will be referred to herein as "Andrew" and his father, plaintiff Dale R. Smith, as "Dale." No disrespect is intended by these references.

from 1998 to 2002. During the 2001-2002 school year, Andrew was in the 12th grade. He graduated from Novato High School in June 2002. Plaintiff Dale R. Smith is a taxpayer in the City of Novato, Marin County, California, whose place of residence is within the District's boundaries. Dale is Andrew's father and has children currently attending District schools.

Defendant Dr. John Bernard was Superintendent of the District from 1999-2003. His duties included responsibility for overall operation of the District, including supervision of all District office administrators, site principals and departments. He was also responsible for overall operation of the District, including supervision of all District office administrators, site principals and departments. He was also responsible for the implementation of the District Board of Education's policies, goals, rules and regulations.

Defendant Lisa Schwartz was the acting Principal of Novato High School in the District during the 2001-2002 school year. Her duties included the day-to-day management of the operations of the high school, including the implementation of the District Board of Education's policies, goals, rules and regulations (Exh. 30).

The District adopted Board Policy ("BP") 5145.2, Administrative Regulation ("AR") 5145.2 and a Human Relations and Respect Mission Statement, all of which were in effect during the 2001-2002 school year and have remained in effect, unchanged. BP 5145.2

and AR 5145.2 are the District's "Freedom of Speech/ Expression: Publications Code" (Exhs. 4 and 5, respectively).

During the school year 2001-2002, Novato High offered a class in journalism that was taught by Ms. Jennifer Leib. Andrew was one of the students in this class. As part of the class, the students published a newspaper called *The Buzz*. There were editors for particular sections of the newspaper, e.g., news, opinion, features, front page, entertainment. Andrew volunteered for the opinion section. The students chose the editors for the various sections as well as the topics for the articles and opinion-editorials to be published in *The Buzz*.

The class elected Andrew Opinions Editor for the first issue of *The Buzz* in the 2001-2002 school year. He wrote an opinion piece/editorial on illegal immigration entitled *Immigration* (Exhs. 1 and 13). He testified that he cast the editorial in a harsh tone because he wanted to anger people and get some reaction.

Immigration includes the following statements (Exhs 1 and 13):

(1) "I'll even bet that if I took a stroll through the Canal district in San Rafael that I would find a lot of people that would answer a question of mine with 'que,' * * * ."

(2) "Seems to me that the *only* reason why they can't speak English is because they are illegal."

(3) "40% of all immigrants in America live in California * * * because Mexico is right across the border, * * * ."

(4) "[I]f they can't legally work, they have to make money illegal ways. This might include drug dealing, robbery, or even welfare. Others prefer to work with manual labor while being paid under the table tax free."

(5) "If a person looks suspicious then just stop them and ask a few questions, and if they answer "que?", detain them and see if they are legal."

(6) "Others seem to think there should be a huge wall along the Mexican/U.S. border." and

(7) "Criminals usually flee here in order to escape their punishment."

Lisa Schwartz reviewed *The Buzz* for spelling errors, improper grammar and to make sure there were no violations of BP 5145.2 and AR 5145.2. In reading *Immigration* prior to its publication, she was concerned about its content but did not believe that she could prevent its publication.

Immigration was published in *The Buzz* and distributed at Novato High School on November 13, 2001, around 10 or 11 in the morning. Neither Lisa Schwartz nor Dr. John Bernard received any complaints about *Immigration* on November 13, 2001. Ashley Engler, a Novato High student, testified that she picked up a copy of *The Buzz* on November 13, but did not read *Immigration* until she got home that

evening. Some of the language used offended and upset her. Her mother, Laura Machado, testified that she read Ashley's copy of *The Buzz* that evening and that she was also upset with the manner in which Andrew had presented his opinions.

Lisa Schwartz arrived on the Novato High School Campus at 7:00 a.m. on November 14, 2001. Between this time and 7:45 a.m., when she left the campus for a short period of time, she observed and heard nothing out of the ordinary. Upon returning to campus at approximately 8:30 a.m., however, she was confronted on the walkway near her office by four or five Hispanic parents who said that they wished to speak with her. She agreed to do so and invited them into her office. The parents were clearly angry and expressed their upset over some of the statements that had been made in *Immigration*. One parent intimated a concern that her child might do something violent. Another said she was going to the Superintendent's office, and another asked Schwartz why she had allowed the piece to be published. The meeting ended around 9:30 a.m.

When the meeting ended, both Assistant Principals and a counselor approached Schwartz and told her that students were out of class and were angry and upset by the article. The counselor said that the students needed to talk about what was upsetting them. Schwartz believed that the situation was in danger of becoming chaotic. She was concerned about racial clashes and violence and about Andrew's safety and the orderly operation of the school. She did not

want to wait until something bad happened before taking action to prevent it. Accordingly, she decided to gather the students who were upset and out of class and meet with them to hear their concerns. The parents who had met with her overheard this and were included in the meeting.

Schwartz also called the Novato Unified School District Superintendent, defendant Dr. John Bernard, to inform him of what was occurring on campus. Bernard told defendant her [sic] to regain control, which included gathering any undistributed copies of *The Buzz*. Either Schwartz or her secretary then directed Jennifer Leib to gather any undistributed copies, but there were none.

Schwartz then walked to the lecture hall with 25-30 students. During the course of the morning, another four or five parents arrived and went into the lecture hall, and Bernard arrived between 11:00 a.m. and 12:00 p.m. Counselors brought in paper so that students could express themselves in a positive way.[2] They were upset about the publication of *Immigration*. Schwartz told people to talk about what was making them upset. Students expressed their anger

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[2] A number of students prepared responses to *Immigration*, photocopied them and handed them out (Plaintiffs' Exhibit 6). There is no evidence to indicate that this was anything other than a spontaneous desire by them to exercise their right of free speech. Nor is there any evidence that school authorities officially endorsed the opinions expressed by these students or assisted them with the circulation thereof.

over the content of *Immigration* and some were crying. Schwartz did not apologize for publishing *Immigration.* She did apologize for the fact that it had upset so many people, but pointed out that Andrew had certain rights. Bernard was concerned about their distress, and talked about the District's Mission Statement and how critical it was that we all treat each other with respect (Plaintiff's [sic] Exhibit 19).

Before the end of the school day, Schwartz and Bernard prepared a letter to be sent home with the students (Plaintiffs' Exh. 3). The letter expressed regret for the hurt and anger that *Immigration* had caused both students and their parents and provided notice of a meeting to be held the next evening to give families who had not been on campus that day (the 14th) a chance to discuss the matter to answer their questions.

There were approximately 100 people at the meeting the evening of November 15. Students and parents expressed their anger over the content of *Immigration* and the District's allowing its publication. Again, Schwartz apologized that the article had upset so many people. She said that Andrew did have certain freedom of speech rights and that there would be no retaliation against him. Plaintiff Dale R. Smith attended and spoke at this meeting.

On or about November 29. 2001, plaintiff Andrew D. Smith was stalked and assaulted by five or six Latino students. He was hit in the face and suffered a

broken tooth. Andrew and the other student, Jorge Torres, were arrested for mutual combat. Both were suspended as both engaged in physical combat (Exh. 61). Thereafter, plaintiff Andrew was further harassed and threatened. One student told him that he was going to "kick his ass" for "writing shit." He asked Andrew, "What the fuck is your problem, why are you writing shit?" He was called a "little bitch," "coward," "faggot," and "pussy."

Schwartz was concerned for Andrew's safety and told him to report any violence, threats and assault against him.

On December 4, 2001 the Board of Trustees held a meeting. Schwartz spoke at the meeting to inform the Board of the events surrounding *Immigration.* Andrew and Dale Smith both spoke, as did students and parents (Exh. 8). Contrary to plaintiffs' contention, this meeting did not constitute a form of discipline or reprimand of Andrew. Defendants did not at any time discipline, reprimand, punish, or sanction him for writing *Immigration.* While defendants believed that *Immigration* should not have been published in the school's newspaper (see Exh. 3), they did not at any time endorse the positions or views of the students and parents upset with the piece's content.

In January 2002, *The Buzz,* Vol. II, Issue 2, was printed and distributed. Andrew did not write anything for this edition (Exh. 14).

In January 2002, Andrew wrote *Reverse Racism* (Exh. 2). It included the following statements:

(1) A group of 20 drunken white males who beat up a black kid would be treated differently than 20 drunken minorities who beat up a white kid;

(2) If O.J. Simpson were white, then he would have been found guilty. "The only defense he had was to convince the jury that the police officers were racist and consprited (*sic*) to frame him by planting false evidence. Tell me who the racist is there?" He was not found guilty because he is African-American. O.J. Simpson's defense attorney might have been racist.

(3) If Rodney King were white, his beating would have been small news.

(4) "Why is it that minorities get these special privileges?" "Minorities are so quick to judge people as being racist."

(5) "Minorities love confusing the hell out of us white people by giving themselves politically correct names." "I can't comfortably say 'black person' without the possibility of offending someone. I have to say 'African American.' What is that about? If you're black, then everyone knows that you're African and since you're American I guess it's cool to put the two together."

(6) "Then you have Latinos taking offensee (*sic*) if you call them Mexican if they are Puerto Rican or something. Or the Asians getting pissed if you say Chinse (*sic*) when they are Korean."

(7) "The most obvious case of reverse discrimination in my opinion would have to be affirmative action."

(8) "Latinos * * * do all the hard work, and white people don't work nearly as hard."

(9) Minimum wage jobs are crappy jobs.

Schwartz reviewed *The Buzz* and, again, she did not believe that she could prevent publishing *Reverse Racism*. However, she admonished the journalism class to be careful about their articles and told them about ways to handle controversy. She recommended, but never requested or required, that they consider publishing a counter-viewpoint along with *Reverse Racism*. The choice was the students' whether to publish a counter-viewpoint; it was not a directive of either the school or the District that they do so. The students thereupon voted to publish a counter-viewpoint with *Reverse Racism* (Exh. 24).[3] Since there was insufficient time for someone to write a counter-viewpoint before the publication of the February 2002

[3] Andrew in fact testified that no one ever told him that *Reverse Racism* would not be published without a counter-viewpoint and that the class voted to publish it with a counter-viewpoint.

edition of *The Buzz,* the students moved *Reverse Racism* to the next edition of the newspaper (Exh. 15).

The next edition of *The Buzz* was May 2002. This edition contained *Reverse Racism* and a counter-viewpoint entitled *It's About Time.* It also contained another article by Andrew entitled *Embrace Diversity.* (Plaintiffs' Exhibit 16.)

Andrew graduated at the end of the 2001-2002 school year.

Students at both schools currently publish student newspapers that are distributed in classrooms at the schools. Students at Novato High School currently publish a student newspaper entitled *The Buzz,* which is produced by a journalism club. Students at San Marin High School currently publish a student newspaper called *The Pony Express,* which is produced by journalism students at San Marin High School.

II. THE LAW

A. Whether defendants have violated plaintiff Andrew D. Smith's rights in the actions they took with respect to *Immigration* and *Reverse Racism* under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950.

As to the issue of whether defendants violated Andrew's rights under the First Amendment of the

United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950 by the actions they took with respect to *Immigration* and *Reverse Racism,* the Court concludes as follows:

1. **As to defendants Dr. John Bernard and Lisa Schwartz**

With respect to defendants Dr. John Bernard, in his official capacity as Superintendent of Novato Unified School District, and Lisa Schwartz, in her official capacity as Principal of Novato High School, there is no personal liability.

Public employees are immune from liability for "discretionary" acts pursuant to *Government Code* §§ 820 et seq. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 976, 42 Cal.Rptr.2d 842 – a public employee is immune from personal liability in exercising "discretion vested in him"). *Government Code* § 820.2 states, "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

The acts of defendants Bernard and Schwartz of which complaint is made involved the exercise of their discretion, and they are, therefore, immune from personal liability.

2. As to the District

Defendant Novato Unified School District did not violate Andrew's rights under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950 in the actions it took with respect to *Immigration* and *Reverse Racism*.

First, plaintiff Andrew D. Smith's constitutional rights were not violated because he was permitted to publish all of the articles that he wrote.

Second, the use of "fighting words" or epithets is not protected by the Constitution where (A) the speech, considered objectively, is abusive and insulting rather than a communication of ideas and (B) it is actually used in an abusive manner in a situation that presents an actual danger that it will cause a breach of the peace (*Collin v. Smith,* 447 F.Supp. 676, 690, affd. 578 F.2d 1197, cert. den. 439 U.S. 916). *Immigration* and *Reverse Racism* are not protected speech. *Immigration* and *Reverse Racism* contained insulting, derogatory and disrespectful speech directed at various ethnic groups and were not entitled to protection under the First Amendment. Defendants were running a high school and were responsible for the orderly administration of the educational process.

Second, *Tinker v. Des Moines School District,* 393 U.S. 503, states that ". . . . [S]tudents and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . [A

student] may express his [or her] opinions, even on controversial subjects, if he [or she] does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. . . . But conduct by the student, in class or out of it. . . . which for any reason. . . . whether it stems from time, place, or type of behavior. . . . materially disrupts classwork or involves substantial disorder, or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech."

"It is equally clear that daily administration of public education is committed to school officials and that such responsibility carries with it the inherent authority to prescribe and control conduct in the schools. The interest of the state in the maintenance of its education system is a compelling one and provokes a balancing of First Amendment rights with the state's efforts to preserve and protect its educational process. It is also well established that the First Amendment does not require school officials to wait until disruption actually occurs before they may act to curtail exercise of the right of free speech but that they have a duty to prevent the occurrence of disturbances" (*Jeglin II v. San Jacinto Unified School District* (1993) 827 F.Supp. 1459, 1461).

"When a conflict arises between a public school student's right of free speech and the authority of officials to prescribe and control conduct in the schools, a student's free speech right may not be

abridged in the absence of facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. Such justification for curtailment of the student's exercise of the right of free speech does not demand a certainty that disruption will occur, but only the existence of facts which might reasonably lead school officials to forecast substantial disruption. Because of the state's interest in education, the level of disturbance required to justify intervention is relatively lower in a school than it might be on a street corner and the Court may consider all circumstances confronting the school administrators which might reasonably portend disruption" (*Jeglin II v. San Jacinto Unified School District, supra,* 827 F.Supp. at 1461).

Immigration resulted in turmoil, in hurt, in anger, and in Andrew's being threatened and assaulted, all of which contributed to a substantial disruption of the orderly operation of the school. The responsive actions taken by defendants were necessary and appropriate and did not violate Andrew's free speech rights. Thus, defendants' actions in holding the November 14th meeting, writing the November 14th letter, holding the November 15th meeting, and allowing comments from the public during the December 4th Board Meeting did not violate Andrew's right to free speech. There is no evidence that defendants distributed the students' responses to plaintiff Andrew D. Smith's *Immigration* article.

The evidence showed that defendants apologized because of a mistake the administration made in permitting *Immigration* to be published. This apology cannot be construed as a violation of Andrew's constitutional rights. Other than stating that the piece violated District policy regarding student publications (Exh. 3), defendants did not express an opinion with respect to its content. There was no evidence that defendants endorsed any opinions of others with respect to *Immigration.* Furthermore, there was no credible evidence that the District removed any editions of *The Buzz* after they were distributed.

With respect to Andrew's second piece, *Reverse Racism,* the District was concerned that its publication would cause another substantial disruption of or material interference with school activities. The evidence showed that students were extremely upset by *Immigration* and that the school was still in a state of some disturbance over *Immigration* when Andrew submitted *Reverse Racism.* The students tried to figure out how to publish *Reverse Racism* without creating the same kind of problems that *Immigration* did. Schwartz suggested that they consider using a counter-viewpoint. They then voted to print a counter-viewpoint alongside *Reverse Racism.* In order to do this, the students deferred publication of *Reverse Racism* until someone was selected to write a counter-viewpoint and in fact wrote one. The evidence showed that it was the students, not defendants, who decided that a counter-point would be printed alongside *Reverse Racism* and who delayed

the publication of *Reverse Racism* in order to obtain that counter-viewpoint.

Andrew's speech was not censored. Everything he wrote was published. He was not punished, disciplined, reprimanded or sanctioned for writing either *Immigration* or *Reverse Racism*.

B. Whether Novato Unified School District Board Policy, BP 5145.2, and its Administrative Rules and Regulations, AR 5145.2, are facially unconstitutional, invalid, and unenforceable under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950.

As to the issue of whether Novato Unified School District Board Policy, BP 5145.2, and its Administrative Rules and Regulations, AR 5145.2, are facially unconstitutional, invalid, and unenforceable under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950, the Court concludes as follows:

Novato Unified School District Board Policy, BP 5145.2, and its Administrative Rules and Regulations, AR 5145.2, are not facially unconstitutional, invalid, and unenforceable under the First Amendment of the United States Constitution; Article 1,

section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950.

The legislative history of California *Education Code* section 48950 specifically refers to *Tinker v. Des Moines School District,* supra, 393 U.S. 503, and states that ". . . . [S]tudents and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . [A student] may express his [or her] opinions, even on controversial subjects, if he [or she] does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. . . . But conduct by the student, in class or out of it. . . . which for any reason. . . . whether it stems from time, place, or type of behavior. . . . materially disrupts classwork or involves substantial disorder, or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech."

The legislative history of California *Education Code* section 48950 also states "[t]he use of 'fighting words' or epithets is not protected by the Constitution where (A) the speech, considered objectively, is abusive and insulting rather than a communication of ideas and (B) it is actually used in an abusive manner in a situation that presents an actual danger that it will cause a breach of the peace (*Collin v. Smith,* 447 F.Supp. 676, 690, affd. 578 F.2d 1197, cert. den. 439 U.S. 916)."

"It is equally clear that daily administration of public education is committed to school officials and that such responsibility carries with it the inherent authority to prescribe and control conduct in the schools. The interest of the state in the maintenance of its education system is a compelling one and provokes a balancing of First Amendment rights with the state's efforts to preserve and protect its educational process. It is also well established that the First Amendment does not require school officials to wait until disruption actually occurs before they may act to curtail exercise of the right of free speech but that they have a duty to prevent the occurrence of disturbances" (*Jeglin II v. San Jacinto Unified School District,* supra, 827 F.Supp. at 1461).

"When a conflict arises between a public school student's right of free speech and the authority of officials to prescribe and control conduct in the schools, a student's free speech right may not be abridged in the absence of facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. Such justification for curtailment of the student's exercise of the right of free speech does not demand a certainty that disruption will occur, but only the existence of facts which might reasonably lead school officials to forecast substantial disruption. Because of the state's interest in education, the level of disturbance required to justify intervention is relatively lower in a school than it might be on a street corner and the Court may consider all

circumstances confronting the school administrators which might reasonably portend disruption" (*Jeglin II v. San Jacinto Unified School District,* supra, 827 F.Supp. at 1461).

Plaintiffs presented no evidence that Novato Unified School District's Board Policy, BP 5145.2, and Administrative Rules and Regulations, AR 5145.2, are facially unconstitutional, invalid, and unenforceable under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950.

Plaintiffs' counsel argued that the term "school community" as stated in BP 5145.2 is broad because it gives defendants discretion to apply BP 5145.2 outside of the District. The Court finds and decides that the term "school community" within the context of BP 5145.2 is not so vague and overly broad as to be facially unconstitutional, invalid, and unenforceable under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950. The Court finds and decides that BP 5145.2 and AR 5145.2 are applied within the school community and there is no evidence that they are applied outside the school community.

The Court finds and decides that California law permits limitations on speech such as those set forth in BP 5145.2 and AR 5145.2. The District must have the ability to control the publication of material

which is insulting, derogatory, harassing, likely to incite to violence and/or likely to cause a substantial disruption to the orderly operation of the school. BP 5145.2 and AR 5145.2 clearly come within the ambit of the cases that interpret First Amendment rights (see *Tinker v. Des Moines School District,* supra, 393 U.S. 503 and *Collin v. Smith,* supra, 447 F.Supp. 676).

C. Whether defendants unconstitutionally applied BP 5145.2 and AR 5145.2 in the actions they took with respect to *Immigration* and *Reverse Racism* under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950.

As to the issue of whether defendants unconstitutionally applied BP 5145.2 and AR 5145.2 under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950 in the actions they took with respect to *Immigration* and *Reverse Racism,* the Court concludes as follows:

Defendants did not unconstitutionally apply BP 5145.2 and AR 5145.2 in the actions they took with respect to *Immigration* and *Reverse Racism* under the First Amendment of the United States Constitution; Article 1, section 2(a), of the California Constitution;

and California *Education Code* sections 48907 and 48950.

Section II.A, *supra,* is incorporated herein. Furthermore, the question is moot because all of Andrew's articles were published. Schools simply cannot be deprived of the power to conduct the educational process in an atmosphere which is nurturing, positive and one in which the students are learning something, rather than being left to their own devices without any guidance from the people who are entrusted with their education.

D. Whether a permanent injunction is necessary to prevent defendant Novato Unified School District from engaging in viewpoint discrimination when acting to restrict students' free speech rights.

As to the issue of whether a permanent injunction is necessary to prevent defendant Novato Unified School District from engaging in viewpoint discrimination when acting to restrict students' free speech rights, the Court finds as follows:

A permanent injunction is not necessary to prevent defendant Novato Unified School District from engaging in viewpoint discrimination when acting to restrict students' free speech rights.

Sections II.A, B, and C, *supra,* are incorporated herein. A permanent injunction is unnecessary as the

Court finds that the District did not engage and is not engaging in viewpoint discrimination. The District did not act and is not acting to restrict students' free speech rights. BP 5145.2 and AR 5145.2 are not facially unconstitutional, invalid and unenforceable, and the District is not unconstitutionally applying BP 5145.2 and AR 5145.2.

E. Whether plaintiff Andrew D. Smith has suffered nominal damages in the amount of $1.00 as a result of defendants' actions with respect to *Immigration* and *Reverse Racism*.

As to the issue of whether Andrew has suffered nominal damages in the amount of $1.00 as a result of defendants' actions with respect to *Immigration* and *Reverse Racism*, the Court concludes as follows:

Andrew has not suffered nominal damages in the amount of $1.00 as a result of defendants' actions with respect to *Immigration* and *Reverse Racism*.

Sections II.A, B, C and D, *supra*, are incorporated herein. Andrew is not entitled to $1.00 because the Court finds that the District did not violate his rights under the First Amendment of the United States' Constitution; Article 1, section 2(a), of the California Constitution; and California *Education Code* sections 48907 and 48950. BP 5145.2 and AR 5145.2 are not facially unconstitutional, invalid and unenforceable. The District did not and is not unconstitutionally applying BP 5145.2 and AR 5145.2. The District did

not engage and is not engaging in viewpoint discrimination. The District did not act and is not acting to restrict students' free speech rights.

It is hereby ORDERED that judgment be entered in accordance herewith. Defendants shall submit a form of judgment for entry by the Court.

Dated: 8-26-05 /s/ John A. Sutro, Jr.
HON. JOHN A. SUTRO, JR.
JUDGE OF THE
SUPERIOR COURT

COURT OF APPEAL,
FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

ANDREW D. SMITH, ETC., ET AL.,
Plaintiffs and Appellants,
v.
NOVATO UNIFIED SCHOOL DISTRICT, ET AL.,
Defendants and Respondents.

A112083
Marin County No. CV022210

(Filed Jun. 20, 2007)

BY THE COURT:

The petitions for rehearing are denied.

Date: JUN 20 2007 JONES, P.J. P.J.

Court of Appeal, First Appellate District,
Div. 5 – No. A112083
S154067

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ANDREW D. SMITH et al., Plaintiffs and Appellants,

v.

NOVATO UNIFIED SCHOOL DISTRICT et al.,

Defendants and Respondents.

(Filed Sep. 12, 2007)

The petition for review is denied.

The requests for an order directing depublication of the opinion are denied.

Frederick K. Ohlrich Clerk
Deputy

GEORGE
Chief Justice

California Education Code Section 48907

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. [¶] Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction. [¶] Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section. [¶] There shall be no prior restraint of material prepared for official school

publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section. [¶] "Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee. . . .